Neutral Citation Number: [2021] EWCA Civ 1093

Case Nos: C1/2020/1342 AND C1/2020/1356

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION (Administrative Court)
The Hon. Mr Justice Lewis
[2020] EWHC 1598 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2021

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE GREEN
and
LADY JUSTICE ELISABETH LAING

- -

Between :

(1) The Secretary of State for Work and Pensions	**1st Appellant** **1st Interested Party**
(2) The Board of the Pension Protection Fund	**2nd Appellant**
- and –	
Paul Hughes and Others	**Respondents**

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- -

Case No: C1/2020/1342:

Mr Jason Coppel QC and Ms Zoe Leventhal (instructed by **GLD**) for the **1st Appellants**
Mr Gerry Facenna QC and Mr James Bourke (instructed by **Walkers' Solicitors**) for the **1st, 2nd and 6th - 25th Respondents**
Mr Tom de la Mare QC and Iain Steele (instructed by **Farrer & Co LLP**) for the **3rd - 5th Respondents**

Case No: C1/2020/1356:

Ms Jemima Stratford QC and Mr James McClelland QC (instructed by **Hogan Lovells**) for the **2nd Appellants**
Mr Gerry Facenna QC and Mr James Bourke (instructed by **Walkers' Solicitors**) for the **1st, 2nd and 6th – 25th Respondents**

Mr Tom de la Mare QC and Mr Iain Steele (instructed by **Farrer & Co LLP**) for the **3rd-5th Respondents**

Hearing dates: 4th-7th May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 11.00 a.m. on Monday 19th July 2021.

Lady Justice Asplin, Lord Justice Green and Lady Justice Elisabeth Laing:

1. These two linked appeals are brought in relation to the Order of Lewis J (as he then was) ('the judge') dated 30 July 2020, allowing the claimants' judicial review claim. The claim, brought by twenty-four individual claimants and the British Airline Pilots Association ("BALPA"), (together referred to as the "Claimants") concerns the level of compensation paid by the Board of the Pension Protection Fund (the "PPF") in lieu of old-age benefits payable under pension schemes sponsored by the employees' former employers, which have since become insolvent.

2. The Claimants contend that: the provisions of Chapter 3 of the Pensions Act 2004 (the "Act") which impose a cap on the PPF compensation for those who have not attained their normal pension age ("NPA") at the date on which their respective schemes enter what is described as the assessment period, amounts to unlawful age discrimination; and that the method adopted by the PPF to ensure that they receive at least half of the value of their accrued entitlement under their respective schemes is incompatible with Article 8 of Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer (the "Directive").

3. The claim has arisen in the context of a series of long-running disputes concerning the PPF's approach to compensation which have involved proceedings both in this jurisdiction and in the Court of Justice of the European Union ('the Court of Justice'). The present appeals raise issues of profound importance, not only to the Claimants themselves (some of whom are said to have suffered significant reductions in the old-age benefits they expected to receive prior to their employer's insolvency), but more broadly, particularly given the issue as to the lawfulness of the primary legislation setting out the framework for PPF compensation.

Compensation and the Compensation Cap

4. By way of brief summary, the compensation scheme created by the Act protects employees where their employer enters insolvency and the assets of pension schemes sponsored by their employers are insufficient to meet certain protected liabilities. In such circumstances, the pension scheme's assets are transferred to the PPF, the scheme trustees are discharged from their obligations, the PPF becomes responsible for paying compensation in accordance with Schedule 7 to the Act to the individual members instead of the benefits they would have expected to receive from their original scheme, and the scheme is treated as having been wound up: section 161(1) and (2) of the Act.

5. The level of compensation payable by the PPF differs depending on whether a member has attained the scheme's NPA by the time the assessment period begins (in general terms, the date of the employer's insolvency): section 132(2), 162 and Schedule 7 to the Act. Members who have attained NPA by the beginning of the assessment period (or retired early for health reasons) receive compensation equal to 100% of the annual rate of the pension under the admissible rules of their scheme. Members who have not attained NPA at that point receive 90%: among others, Schedule 7, paragraph 3(2) – (7) of the Act. Individuals in the latter group are also subject to a prescribed compensation cap, such that if the compensation payable by the PPF would exceed the cap, they receive only 90% of the capped amount: among others, Schedule 7, paragraphs 3(10) and 26. Amendments were made by Schedule 20 to the Pensions Act 2014 (which

introduced paragraph 26A into Schedule 7 to the Act). They apply from 6 April 2017 onwards. The effect of amendments is that the compensation cap for those with more than 20 years' pensionable service is increased by 3% for each year of pensionable service in excess of 20 years. The cap was initially fixed at £27,777.78 per annum in 2005 and has since increased in line with earnings, reaching £40,020.34 per annum in 2019/20.

6. There are also provisions by which the value of the compensation is increased in the period before the individual reaches NPA (when the compensation becomes payable) and after it comes into payment. Annual periodic compensation is increased annually by the lesser of: (a) price inflation or (b) 2.5% (Schedule 7, paragraph 28(3)). The increases are not applied to amounts payable in respect of pensionable service before 6 April 1997.

7. The widow or widower of a pensioner is also entitled to compensation from the date of the pensioner's death and continuing for life. The annual rate of that periodic compensation is half of the annual rate of compensation to which the pensioner would have been entitled if they had not died: paragraphs 4(2) and (3) of Schedule 7 to the Act. The "half benefits" rule applies irrespective of the survivors' benefits prescribed in the member's original pension scheme. In other words, even if the survivor was entitled to 2/3 of the scheme member's benefits under the original scheme rules, s/he will only receive compensation amounting to half of the compensation paid to the pensioner.

The Court of Justice's judgment in *Hampshire*, the decision of the PPF under challenge and these proceedings

8. Mr Hampshire, one of the Claimants in these proceedings, previously brought a claim relating to the PPF's assessment of the pension scheme of which he was a member, and to the application of the compensation cap. Those proceedings reached this Court, which made a reference to the Court of Justice regarding the interpretation of Article 8 of the Directive. The Court of Justice handed down judgment on that reference in 2018, in *Hampshire v Board of the Pension Protection Fund* (Case C-17/17) [2019] I.C.R. 327 ("*Hampshire*"). It ruled that Article 8 requires Member States to guarantee to each individual employee compensation corresponding to at least 50% of the value of his or her accrued pension entitlement, in the event of the employer's insolvency. It also ruled that Article 8 is directly effective, and thus may be relied upon by individuals in national court proceedings.

9. In response to the decision in *Hampshire,* and pending the introduction of legislation to address the issue, the PPF took steps aimed at ensuring that compensation paid to members of schemes for which it had assumed responsibility would not fall below the 50% threshold. By a decision dated 5 November 2018 ("the Decision"), it adopted an approach under which it would conduct a one-off actuarial valuation of pension benefits payable to the scheme member under his or her original scheme; compare that with the amount of compensation the PPF would pay the member over time, and, if it was estimated that the latter would be less than 50% of the former, it would pay an additional amount of compensation to meet that minimum threshold. This has been referred to as a "Hampshire Uplift".

10. The Decision manifested in the Hampshire Uplift, and the imposition of the compensation cap ("the cap") were challenged by the Claimants by an application for judicial review. The matter came before the judge, who allowed the claims. We will address his conclusions in detail below, but in essence, three aspects of his decision are central to the present appeals. First, the judge held that the provisions in the Act which cap the compensation payable to scheme members who have not achieved NPA at the date of their employer's insolvency amounted to unlawful age discrimination, contrary to Article 21(1) of the EU Charter of Fundamental Rights ('the Charter') and Article 14 (read with Article 1 Protocol 1) of the European Convention on Human Rights ('the ECHR'). Before coming to that conclusion, the judge granted the claimants an extension of time to bring that claim. Second, he held that the PPF's approach to the Hampshire Uplift did not comply with the requirements of Article 8 of the Directive, as articulated by the Court of Justice in *Hampshire*. Its one-off calculation meant there was a possibility that some scheme members might ultimately receive less than 50% of their original entitlement, and the system needed to have a way of identifying and dealing with that eventuality; absent such a checking mechanism, the PPF's decision and, therefore, the use of the Hampshire Uplift, was unlawful. Third, the judge held that the PPF's approach to survivors' benefits was unlawful. Survivors must receive compensation equivalent to at least 50% of the value of the survivors' benefits under the original scheme of which the employee (whose survivor they are) was a member.

The Parties and the relevant background

11. The First Appellant is the Secretary of State for Work and Pensions, who challenges the judge's conclusion that the provisions in the Act enacting the cap are unlawful ("the Secretary of State's Appeal"). The Second Appellant is the PPF, which objects to the judge's conclusions on its approach to the Hampshire Uplift and on survivors' benefits (the "PPF Appeal").

12. As we have said, the Claimants (who are the respondents in these appeals) comprise twenty-four individuals and BALPA. The Claimants were members (or, in two cases, surviving spouses of two members) of one of four pension schemes which fell to be assessed by the PPF following the insolvency of the employer: the Turner and Newall (or "T&N") Scheme, the Heath Lambert Group (or "HLG") Scheme, the BMI Scheme and the Monarch Scheme. BALPA represents members of the latter two schemes, including some of those who are Claimants in these proceedings and others who are not involved.

13. Each of the schemes was a contributory occupational pension scheme which was intended to provide a final salary pension. The T&N Scheme entered assessment on 10 July 2006, and is still in assessment: the reference to the Court of Justice in *Hampshire* arose following a challenge to the PPF's valuation of that scheme's assets and liabilities and the matter has not yet been finally settled in a domestic court. The HLG Scheme entered assessment on 26 May 2005, and, following the conclusion of that assessment, was transferred to the PPF on 10 March 2010. The BMI scheme entered assessment on 25 June 2010 and transferred to the PPF on 12 March 2013; the Monarch scheme entered assessment on 10 November 2014 and transferred to the PPF on 2 November 2016.

14. In his judgment at [28] - [45], Lewis J provides worked examples of the compensation received by Claimants from each scheme who were under their scheme's NPA at the

assessment date and were therefore caught by the cap. He also summarises the evidence of two individuals, wives of members of the T&N Scheme and the HLG Scheme, who have received survivors' benefits from the PPF following the death of their spouse. The examples given by the judge compare the yearly amounts that each individual would have received under their pension scheme and the compensation they actually received from the PPF. The shortfall is often significant. For instance, Lewis J describes the situation of Mr Hughes, a member of the HLG Scheme, as follows:

> "36. The first claimant, Paul Hughes, was born on 25 September 1946. After qualifying as an accountant, and working elsewhere, he joined CH Heath in 1975. He worked in various senior roles in the company. He left employment in 1999 and worked for other companies. He ceased work in 2003, aged 56, as his wife, sadly, had become terminally ill.
>
> 37. Mr Hughes was a member of the HLG Scheme from 1975 until he left the scheme in 1999. Under the scheme, his NPA was 60. However, he was permitted to retire early and draw his pension benefits. On retirement, he was entitled under the HLG Scheme to an annual pension of £66,245 (he had commuted part of his pension to receive a lump sum). Different indexation provisions applied to different parts of this pension. Roughly 2/3 (£47,443.47 at retirement) increased annually by 5%. A small part increased in line with inflation but capped at 5% annually. Part (approximately £13,744.84) would not be increased until age 65 at which point annual increases in line with retail price inflation but capped at 3% would apply.
>
> 38. The employer became insolvent and the HLG Scheme entered into assessment on 26 May 2005. From that date, Mr Hughes' pension benefits were reduced to those which would be payable if the HLG Scheme were transferred to the Fund. The assessment was concluded, and the HLG Scheme in fact transferred to the Fund on 10 March 2010.
>
> 39. As Mr Hughes was 59 on the date assessment began, he was below his NPA of 60. The compensation cap was therefore applied to him. As he was six years below the age of 65, the cap was actuarially reduced. He received 90% of the capped amount. Mr Hughes was in receipt of a pension of £66,245 per annum immediately before assessment. On the application of the compensation cap, that was reduced to £17,481 per annum, that is, a little over 26% of his scheme entitlement. Mr Hughes calculates the figures for the tax years ended 2007 to 2018 and they are, broadly, as set out in the following table:

Tax year to April	**Scheme pension**	**Pension received**
2007	£71,568	£17,636

2008	£74,438.43	£17,746
2009	£77,456	£17,822
2010	£80,642.01	£17,872
2011	£83,900.41	£17,899
2012	£87,597.27	£17,978
2013	£91,481.40	£18,060
2014	£95,449.33	£18,143
2015	£99,652.51	£18,217
2016	£103,923.11	£18,625
2017	£108,289.69	£18,288
2018	£112,958.64	£21,719

The effect of Brexit on these proceedings

15. As we have already explained, these appeals turn to a large extent on rights arising under Article 8 of the Directive and on the application of the Charter. The judicial review claim was heard by Lewis J in May 2020, and his judgment was handed down on 22 June 2020, prior to "IP completion date" as defined in the European Union (Withdrawal Agreement) Act 2020, i.e. 31 December 2020. That date has now passed, but for the purposes of these appeals, it is common ground that to the extent the points at issue turn on the interpretation and application of the Directive and the case law of the Court of Justice, the UK's exit from the European Union does not have any impact. This is because under s.4(2)(b) of the European Union (Withdrawal) Act 2018, rights arising under a Directive that were recognised as having direct effect prior to 31 December 2020 form part of domestic law. Article 8 of the Directive has been so recognised: see the Court of Justice's judgment in *Hampshire*, [70].

16. We should also mention that the PPF has applied for permission to advance an alternative argument to those pursued in these appeals, concerning this Court's power to depart from the case law of the Court of Justice. However, that application has been adjourned and we did not hear any argument on the point, so we shall say no more about it.

17. Although the issues in the Secretary of State's Appeal came to the fore as a result of the decision in *Hampshire* and the Claimants' consideration of the details of the Hampshire Uplift, they are essentially separate from those which arise in relation to the PPF Appeal. Nevertheless, the Directive, the decision in *Hampshire* and the Hampshire Uplift are useful background to the Secretary of State's Appeal. We set them out here, for convenience, under the heading of the PPF Appeal, but it must be borne in mind that they are also relevant to the Secretary of State's Appeal.

The PPF Appeal

The Directive, *Hampshire* and the Hampshire Uplift

18. As we have already mentioned, the Directive is central to the appeals before us. As we indicated in paragraph 2, above, its title shows that it is a Directive "on the protection of employees in the event of the insolvency of their employer." It codifies the earlier Council Directive 80/987/EEC, the central provisions of which were in substantially the same form. The third Recital to the Directive provides:

> "(3) It is necessary to provide for the protection of employees in the event of the insolvency of their employer and to ensure a minimum degree of protection, in particular in order to guarantee payment of their outstanding claims, while taking account of the need for balanced economic and social development in the Community. To this end, the Member States should establish a body which guarantees payment of the outstanding claims of the employees concerned."

Article 1 paragraph 1 states that the Directive applies to "employees' claims arising from contracts of employment or employment relationships . . . existing against employers who are in a state of insolvency . . ." Articles 3 and 4 are as follows:

> "*Article 3*
>
> Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships.
>
> The claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.
>
> *Article 4*
>
> 1. Member States shall have the option to limit the liability of the guarantee institutions referred to in Article 3.
>
> 2. If Member States exercise the option referred to in paragraph 1, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering the remuneration of the last three months of the employment relationship prior to and/or after the date referred to in the second paragraph of Article 3.
>
> Member States may include this minimum period of three months in a reference period with a duration of not less than six months.

> Member States having a reference period of not less than 18 months may limit the period for which outstanding claims are met by the guarantee institution to eight weeks. In this case, those periods which are most favourable to the employee shall be used for the calculation of the minimum period.
>
> 3. Member States may set ceilings on the payments made by the guarantee institution. These ceilings must not fall below a level which is socially compatible with the social objective of this Directive.
>
> If Member States exercise this option, they shall inform the Commission of the methods used to set the ceiling.
>
> Article 11 makes clear that the Directive does not "affect the option of Member States to apply or introduce laws, regulations or administrative provision which are more favourable to employees".

19. Article 8 itself provides as follows:

> "Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes."

20. As we have already mentioned, the meaning of Article 8 has been clarified and amplified in a series of cases to which we will refer in more detail below. The decision in *Hampshire* is central to this appeal. In that case the Court of Justice held that Article 8 must be interpreted as meaning that every individual employee must receive old-age benefits corresponding to at least 50% of the value of his accrued entitlement under a supplementary scheme, in the event of his employer's insolvency, and that Article 8 has direct effect and may be invoked before a national court by an individual employee.

21. It was as a result of that decision that the PPF introduced the Hampshire Uplift. As those arrangements are the subject matter of the PPF Appeal, it is helpful to consider them in a little more detail. They were described succinctly by the judge at [148] of his judgment in the following way:

> "[The Board] makes an actuarial valuation as at assessment date of the value of the benefits payable under the scheme and compares that with an actuarial valuation of the compensation payable by the Board. If the value of the compensation is less than 50% of the assessed value of the scheme benefits, it pays an uplift or additional amount. The method adopted by the Board means that it may pay more than 50% of the value of the pension benefits that would have been payable under the scheme in some

> (typically the early) years and an amount that is less than 50% of the value of benefits that would have been payable in later years. In terms of survivors' benefits, it includes the value of a survivor's benefits, determined by actuarial assumptions, in its calculation of the value of the member's scheme benefits and of the compensation when carrying out the one off calculation. It then pays any survivor's benefits at the rate provided in the Act, i.e. at 50% of the member's compensation as at the date of the member's death."

22. Both the valuation of the scheme entitlements and the PPF payment rights are carried out as at the date of the employer's insolvency, being the date when the protection under Article 8 is engaged. Appropriate actuarial assumptions are used which take account of the features of the relevant pension scheme and the nature and scope of the member's rights under it. Further, as the judge described, this takes into account the member's rights, if any, to survivors' benefits under the relevant scheme. Those benefits are treated as forming part of the member's "basket" of rights and are factored in to the calculation of the member's compensation. This process has been referred to as the "Value Test".

The judge's reasoning

23. The judge identified three issues relevant to the lawfulness of the PPF's method at [149], as follows:

> "(1) Is the Board required to operate a system whereby it ensures that, in each year in which compensation is payable, the amount of the compensation is not less than 50% of the amount of the scheme benefits that would have been payable in that year?
>
> (2) Is it open to the Board to use an actuarial valuation of the benefits to be provided or must it ensure that, over the lifetime of a member, the cumulative value of the compensation paid is no less than 50% of the actual amount of benefits that would have been paid under the scheme? and
>
> (3) Does the system of dealing with survivors' benefits satisfy the requirements of Article 8 of the Directive?"

24. The first question was based upon Mr Facenna QC's case before the judge. He argued that in order to fulfil the requirements of Article 8, as explained in the *Hampshire* case, it was necessary for the PPF to be satisfied that PPF compensation was not less than 50% of the amount of the individual employee's scheme benefits that would have been payable in each and every year. The judge rejected that argument and answered this first question in the negative (see [186]). There is no appeal against that conclusion.

25. It is helpful, nevertheless, to understand the judge's reasoning in this regard. Having analysed the case law in relation to the scope of Article 8, the judge concluded that the guarantee it provides is owed to each individual [177] and went on:

"178. . . . the protection requires that a person receives 50% of the value of the accrued pension entitlement arising out of the contributions that he or she has made to the pension scheme. That involves not simply considering the value of the accrued entitlement as at the date of insolvency: it must also include protection in respect of any envisaged growth in the pension entitlement throughout the period that the pension will be paid.

179. There is scope for argument as to how that value is to be calculated. There are occasions when the language of the court suggests that it is dealing with the calculation of the value at a particular point in time of accrued future entitlement. The fact that the evidence on which the court relies is, in the main, actuarial evidence as to the value, at a particular point of time, of future entitlements arising under the pension scheme is consistent with that approach.

180. There are, however, clear indications that what the Court of Justice had in mind was that, over the lifetime of a member, the compensation that the member will receive will be equal to 50% of the benefits that he or she would have received under the rules of the pension scheme. That that is the correct approach is apparent from a number of considerations.

181. Most clearly, the correct transposition of the Directive is said to require that the employee receives "at least half the old-age benefits arising out of the accrued pension rights for which he has paid": see *Hogan* [51], and *Hampshire* at [45]. That also accords with the concept that increases in pension due to inflation must also be included within the scope of the Article 8 guarantee and that the scope of the guarantee is aimed at protecting the value of the benefits over the entire pension period. That is not conclusive as those future entitlements could be given a present value and some of the language used (such as "envisaged" growth, rather than actual increases) could be said to be consistent with valuation at a particular time of future anticipated entitlements. But, reading the judgments overall, the conclusion that I have reached is that the Court of Justice interprets Article 8 of the Directive as intended to provide a minimum level of protection for the pensioner over the entire period of his or her pension entitlement. The level of protection must have regard to the level of benefits payable on insolvency and any increase in the benefits payable over time. The guarantee is intended to ensure that the sums that the member receives will equal 50% of the amounts, over time, that the member would have received under the pension scheme.

182. That, however, is not the end of the matter. The case law stops short of prescribing the method by which that result is to be achieved. My reading of the case law simply means that any scheme designed to secure the Article 8 guarantee must,

> ultimately, ensure that a pensioner receives 50% of the value of the accrued entitlement in the sense of the value of the benefits that would be paid by the scheme over the period of entitlement. That does not, of itself, determine whether the scheme as devised by the Board would run counter to that obligation.
>
> 183. In that regard, it is important to bear in mind that it is for the Board to determine what scheme it wishes to adopt pending legislation to ensure that the Article 8 guarantee is satisfied. It is for the Board to determine whether it prefers to adopt one scheme rather than another, in order to reduce administrative complexity and costs, and thereby limit the amount of the levy (or the amount of the transferred assets or returns) spent on such matters rather than on the payment of compensation. But the scheme adopted by the Board must be one that can be operated in accordance with Article 8 of the Directive or sufficient modifications will need to be made to it to ensure that Article 8 will be complied with. The scheme that the Board wishes to adopt is based on a one-off calculation, at the date of assessment, of the value of future entitlements (including annual increase and survivors' benefits). The actual payments made will be made in accordance with the existing scheme of Sch.7 to the Act (including the indexation provisions in [28]). The Board wishes to follow that scheme partly, it seems, to reduce complexity and cost and partly to operate so far as it can within the constraints of the current legislation. The issue is to what extent, if at all, must the Board make adjustments (or adopt a new scheme) in order to ensure compliance with Article 8 of the Directive."

26. In short, therefore, the judge held that although a member state might choose to adopt a scheme which operates by considering each year whether the amount of compensation paid is equal to at least 50% of the pension benefits that would have been paid in that year, it was not obliged to do so. When rejecting the argument, the judge stated as follows:

> "184. . . . I do not consider that the case law requires such an approach. The references to "outcomes" in *Hogan* or to the guarantee relating to pension entitlement "over the years" or taking account of envisaged growth in pension entitlement to prevent the amount guaranteed, as "a result of the passage of time", falling "below 50% of the initial value accrued for one pension year" (see [52] of the opinion of the Advocate General, and [51] of the judgment of the Court, in *Hampshire*) do not establish that as a requirement. Those comments were made in the context of seeking to identify the scope of the Article 8 guarantee, and ensuring it applied not simply to pension benefits payable as at the date of insolvency but also increases payable over time due to inflation. Neither those comments, nor any other observations in the case law, prescribe a method involving a year on year assessment to determine if the amount of the

> compensation in that year falls below 50% of the amount of the benefits that would have been paid under the pension scheme in that year."

27. Having rejected a requirement to adopt a scheme which operates by considering each year whether the amount of compensation is equal to at least 50% of the pension benefits which would have been paid in that year, the judge held that the PPF "is entitled instead, if it chooses, to adopt a scheme which involves a one-off calculation, and then to pay out the compensation due as a result of that calculation over the period of the pension". The judge noted that that might "involve paying more than 50% in some years and less in others provided that, overall, the cumulative level of compensation paid does not fall below 50% of the value of the benefits that would have been paid under the scheme over the lifetime of the pensioner". ([186])

28. It is the judge's conclusions in relation to the second and third questions which are challenged by the PPF. The judge explained that the second question was "whether it is sufficient if the Board [the PPF] makes an actuarial calculation of the value of all existing and future entitlements at a particular point in time". He went on: "the obligation is intended to ensure that over a member's lifetime, the compensation he or she receives will be equal to 50% of the benefits that the member would have received under the scheme. Put simply, the obligation is to provide 50% of the actual value, over time, of the benefits not 50% of the actuarially predicted value" [187].

29. The judge added that if the system adopted left open the possibility that an individual member might, ultimately, receive less by way of compensation than 50%, then the system would need to have a way of identifying and dealing with that eventuality, albeit that the precise details of the system were a matter for the PPF. See [187] and [188].

30. The judge's consideration of the practicalities in this regard was as follows. First, in the vast majority of cases there would be no realistic prospect of the compensation falling below 50% but that it was for the PPF and not the court to design checks which can be built in ([189]). Secondly, the greatest problem giving rise to difficulty, on the evidence, was those members whose pension benefits were capped and who had large periods of pre-April 1997 pensionable service. However, having found that the cap is unlawful and must be dis-applied, the problem had, to that extent, been solved ([190]). Thirdly, the judge concluded as follows:

> "191. . . . it seems there may be the possibility that there may be a subset of persons who might receive compensation which is less than 50% of the cumulative benefits that they would have received under the pension scheme. This possibility is referred to by Ms McCrory in [57] of her first statement. There is also evidence to suggest that, in some cases, if a person lives for longer than the expected actuarial lifetime, and has considerable pre-April 1997 pensionable service (or if inflation assumptions prove to be markedly wrong), such persons may receive less than 50% of the cumulative value of benefits. The Board will need to consider, as explained in [189] above, adjustments to the system to ensure that that possibility is identified and addressed."

This has been referred to as the "Lifetime Payments Test".

31. As to the third question which is concerned with survivors' benefits, the judge held that the PPF's approach was "wrong in principle" [193]. His reasoning was set out at [194], as follows:

> "The wording of Article 8 of the Directive is concerned with protecting the rights of employees. But it specifically recognises that those rights will include survivors' benefits. While the entitlement to the benefits derive from rights acquired by the member and are funded by contributions made by that member and his employer, the benefits themselves are intended to be enjoyed by the survivor after that member's death. They are intended to make financial provision for the survivor during her lifetime. The obligation "to protect the interests of employees" applies to the payments made to survivors. Just as payment of less than 50% of the value of the pension benefits during the member's lifetime would not be considered to "fall within the definition of the word 'protect'" (see per the Court of Justice at [57] of its judgment in *Robins*), payment of an amount that is equivalent to less than 50% of the value of the benefits that would be paid to the survivor would not provide protection of survivors' benefits."

32. The judge also noted that his conclusion was consistent with the approach of the Court of Justice on whether survivors' benefits amount to pay within the meaning of Article 157 of the Treaty on the Functioning of the European Union (formerly Article 119 of the EEC Treaty) so that the prohibition on discrimination applied to such benefits. See [195]. He quoted paragraphs 11 – 13 of *Ten Oever v Stichting Bedrifts-Pensioenfonds* (C-109/91) [1995] 2 E.C.R. 1-4879, in which the Court of Justice said:

> "11. It is also established that this pension scheme is funded wholly by the employees and employers in the industry concerned, to the exclusion of any financial contribution from the public pursue.
>
> 12. It must be inferred from those factors that the survivor's pension in question falls within the scope of Article 119 EEC.
>
> 13. This is so notwithstanding that, by definition, a survivor's pension is not paid to the employee but to the employee's survivor. Entitlement to such a benefit is a consideration deriving from the survivor's spouse's membership of the scheme, the pension being vested in the survivor by reason of the employment relationship between the employer and the survivor's spouse and being paid to him or her by reason of the spouse's employment."

33. In this regard, he concluded that:

> "196. . . . The guarantee would require them to receive compensation equal to 50% of half of their spouses' pension calculated in accordance with the relevant scheme. It is not

> possible for this court, on the evidence provided to determine whether the system adopted by the Board will achieve that. Further, there is evidence that Mrs Mackenzie-Green would have received a lump sum payment of the difference between five times her husband's pension and the actual amount (approximately two years) of pension received by him before his death. Again, that would appear to be part of the survivor's benefits and the compensation paid would need to ensure that it included an element equal to 50% of the value of that aspect of her survivor's benefits. Those are all matters for the Board to consider in the first instance in accordance with this judgment both in relation to these two claimants and other survivors. The Board will need to consider the system, and any adjustments necessary, in light of the need to ensure that any survivor receives compensation of at least 50% of the value of the survivor's benefits, over time."

PPF Grounds of Appeal and the issues arising

34. In essence, the PPF contends that the judge was wrong to decide that the Hampshire Uplift was not a lawful means of fulfilling the obligation contained in Article 8, as explained in the *Hampshire* case and the other relevant case law and that the Lifetime Payments Test should be applied. It is said that he erred in rejecting a comparison of the actuarial value of the employee's accrued entitlement with his PPF benefits and preferring what he described as their actual value over time. The PPF submits that the judge made a similar error in his approach to survivors' rights when deciding that a survivor is entitled to an amount equivalent to no less than 50% of the benefits which the survivor would have received under the employee's pension scheme, combined with a misunderstanding about the status of the survivor for the purposes of Article 8.

35. The issues which arise in relation to the judge's second and third questions, therefore, are as follows:

    i) Does Article 8 impose an obligation to provide by way of pension protection, 50% of the actual value, over time, of the benefits which a member would have received under the pension scheme to which they belonged rather than 50% of the actuarial value of those benefits and does that require the use of a Lifetime Payments Test?

    ii) Does Article 8 similarly require payment of an amount equivalent to no less than 50% of the benefits which the survivor of a member would have received under the relevant pension scheme?

First Issue – actual value over time?

36. This issue arises from the PPF's grounds of appeal and the way in which the PPF and the Claimants phrased their written argument before us. It also springs from [187] of the judgment at which the judge explains in beguilingly simple terms that "the obligation is to provide 50% of the actual value, over time, of the benefits not 50% of the actuarially predicted value".

37. It is important to note, however, that the judge also describes the circumstances in which adjustments will be necessary by reference to cumulative value of the pension benefits which would have been received or the cumulative level of compensation paid. He does so at [186] when explaining that a one-off calculation may be employed and may involve paying more that 50% in some years and less in others; at [190] when commenting upon the situation for those affected by the cap where he notes that the cap "could lead to a member receiving overall less than 50% . . ."; and at [191] in relation to those who live longer than their expected actuarial lifetime who also have considerable pre-April 1997 pensionable service, or if inflation assumptions prove to be markedly wrong. In relation to them he states that they "may receive less than 50% of the cumulative value of benefits" and that in such cases the PPF would have to make adjustments to the system.

38. It seems to us that the judge's reference to the "cumulative value of pension benefits" is a way of amplifying and explaining what he had referred to at [187] as the difference between an "actuarially predicted value" and the "actual value over time of the benefits" and that his formulation at [187] should be understood in that light. Having rejected the year-on-year approach and having accepted that once a one-off calculation is employed more than 50% may be paid in some years and less in others, he considered, nevertheless, that the Article 8 obligation required the member to receive, overall, 50% of the cumulative value of the pension benefits he would have received under his original scheme. In effect, he held that a one-off prospective determination of the relative value of the employee's accrued entitlement under the occupational scheme and the PPF benefits must be re-visited on appropriate occasions with the benefit of hindsight and at that stage a retrospective valuation would be necessary to ensure that the 50% floor had been maintained overall.

39. Miss Stratford QC, on behalf of the PPF, submits that the Value Test which comprises a one-off prospective and comparative valuation is entirely consistent with Article 8, as explained in the case law. She says that the judge misunderstood the nature of an actuarial valuation of the employee's rights under his or her scheme and the rights to which the employee becomes entitled under the PPF Scheme and mischaracterised the Value Test as a mere prediction rather than an assessment of actual value. She submits that the fact that a valuation makes use of forward looking techniques does not prevent it from being the best and probably the only way of assessing the actual value of a lifelong right to periodic payments.

40. In effect, her case is that there is no gap between an actuarial valuation of the value of accrued entitlement over time and the actual value. Furthermore, she says that Article 8 is worded in broad terms and that the case law is not concerned with the means by which the "at least 50%" obligation is delivered and, in any event, there are no indications in the cases which would require the Lifetime Payments Test to be adopted.

41. The Claimants, who do not seek to challenge the judge's rejection of their year-on-year approach to the comparison between accrued entitlement and compensation under the PPF scheme, and instead, seek to uphold the judge's own formulation of the Article 8 obligation, say that the short answer to the PPF's appeal is as the judge described it at [187]. The Value Test does not discharge the obligation imposed by Article 8, as interpreted in the case law, because it is necessary to provide at least half of the actual value of an employee's pension benefits over time, whatever their lifespan may be and

whatever the economic circumstances may be, and not half of the actuarially predicted value.

42. They illustrate this at paragraph 31 of their written argument by reference to the use of actuarial assumptions, for example, in relation to life expectancy, inflation and the likelihood of being married etc. – and note that some members will end up being "short-changed" if only because they live longer than average. They state, therefore, that those individuals will not receive "at least half of the benefits they paid for through contributions and which they were entitled to receive under their scheme rules". They explain what they describe as the "gist" of the judgment below as no more than a need to adjust or complement the PPF's one-off actuarial valuation approach to identify those cases in which that approach falls short of providing the minimum level required.

Indications?

43. What does Article 8, as interpreted in the case law, require? We have already set out Article 8 at [19] above. Does the case law contain the "indications" to which the judge referred at [180] of the judgment, upon which he based his rejection of the Value Test and the adoption of his own approach in the form of the Lifetime Payments Test? Before turning to the case law, it is important to bear in mind that the judge quite rightly appreciated that the cases were not focussed upon the manner in which the Article 8 protection had to be delivered. Neither Article 8 itself, nor the case law, is concerned with methods or practicalities. In the absence of any direct authority, the judge was seeking "indications" from that case law as to whether what was required was an annual comparison between the value of the actual benefits which would have been received, had the scheme remained in being, and the PPF compensation. The cases should be approached, therefore, on that basis.

44. The judge set out a detailed analysis of the majority of the case law to which we were referred. As his decision turns upon his interpretation of the "indications" which he says the case law contains, we consider it important to set out our own analysis of the case law in some detail.

45. It is convenient first to consider the Court of Justice's decision in *Hampshire*. As we have already mentioned, the Court of Justice in that case was not addressing the type of question with which we are concerned. In summary, the questions which were referred to it for a preliminary ruling were: whether Article 8 required member states to ensure that every individual receives at least 50% of the value of his accrued entitlement to old age benefits in the event that his employer becomes insolvent, or whether it is sufficient that there is a system of protection under which employees usually receive more than 50% but some individuals receive less, and whether Article 8 is directly effective. The precise questions are set out at [32] of the decision and at [166] of the judge's judgment.

46. As the judge pointed out at [167] of his judgment, the Court of Justice noted that the amount of compensation payable under Schedule 7 to the Act was capped for those under NPA and those employees received 90% of the capped amount, and that the statutory provisions did not provide an adjustment for inflation for compensation attributable to employment prior to 6 April 1997 ([12] – [14]). It also set out Mr Hampshire's personal position.

47. In that context, it stated at [39] that the referring court was asking in essence whether Article 8 must be interpreted as meaning that:

> "every individual employee must receive compensation corresponding to at least 50% of the value of his accrued entitlement under a supplementary occupational pension scheme in the event of his employer's insolvency, or whether it is sufficient that such compensation is guaranteed for the great majority of employees, but, owing to certain limitations imposed by national law, some of those employees receive less than 50% of the value of their accrued entitlement".

48. As the judge pointed out at [169] of his judgment, the Court then summarised its understanding of the case law at [41] – [43] of its judgment in the following terms:

> "41. … states have considerable latitude in determining both the means employed for the purposes of that protection and the level of protection provided, which does not include an obligation to guarantee in full *Robins v Secretary of State for Work and Pensions* (C-278/05) [2007] I.C.R. 779; [2007] ECR I-1053, paras 36 and 42–45; *Hogan v Minister for Social and Family Affairs* (C-398/11) [2013] 3 C.M.L.R. 27, para 42 and *Webb-Sämann v Seagon* (C-454/15) [2017] 2 C.M.L.R. 18, para 34.
>
> 42. As a result, article 8 of Directive 2008/94 does not preclude member states, in the pursuit of legitimate social and economic objectives and, in particular, having due regard for the principle of proportionality, from reducing the accrued entitlement of employees in the event of their employer's insolvency.
>
> 43. However, as regards article 8 of Directive 80/987, now article 8 of Directive 2008/94, the court has held that provisions of domestic law that may, in certain cases, lead to a guarantee of benefits limited to less than half the entitlement accrued cannot be considered to fall within the definition of the word 'protect' used in that provision: *Robins*, para 57."

As the judge explained at [170] of his judgment, the Court of Justice stated that it had confirmed that interpretation in *Hogan* and repeated its observation at [51] of the judgment in *Hogan* that the correct transposition of Article 8 of the Directive:

> "requires an employee to receive, in the event of the insolvency of his employer, at least half of the old-age benefits arising out of the accrued pension rights for which he has paid contributions under a supplementary occupational pension scheme".

49. Having confirmed that the case law made it clear that the level of protection provided for by Article 8 of the Directive "is an individual minimum guarantee for each and every employee" (see [46] of its judgment), the Court of Justice went on as follows:

> "50. Consequently, article 8 of Directive 2008/94 requires member states to guarantee each individual employee, without exception, compensation corresponding to at least 50% of the value of their accrued entitlement under a supplementary occupational pension scheme in the event of his employer's insolvency, although that does not mean that, in other circumstances, the losses suffered, even if less than 50%, could also be regarded as manifestly disproportionate in the light of the obligation to protect the interests of employees, referred to in that provision: *Webb-Sämann* at [35].
>
> 51. Moreover, as stated, in essence, by the Advocate General in points 48 to 53 of her opinion, in order to ensure the full effectiveness of the minimum protection afforded to employees in the event of their employer's insolvency by article 8 of Directive 2008/94, which requires that that protection lasts for the entire pension period, the compensation corresponding to at least 50% of the value of their accrued entitlement must be calculated taking into account the envisaged growth in the pension entitlement throughout that period, in order to prevent, as a result of the passage of time, the amount guaranteed falling below 50% of the initial value accrued for one pension year.
>
> 52. In the light of the above, the answer to the first and second questions is that article 8 of Directive 2008/94 must be interpreted as meaning that every individual employee must receive old-age benefits corresponding to at least 50% of the value of his accrued entitlement under a supplementary occupational pension scheme in the event of his employer's insolvency."

50. Paragraph 51 contains an endorsement of points 48 – 53 of the Advocate General Kokott's opinion. In those paragraphs, the Advocate General had been addressing the question of whether Article 8 "relates only to the value of the claims at the time of the insolvency of the employer or includes envisaged growth in the level of the benefit over the entire pension period" (Opinion at [48].) Her comments were made in response to question 2(b) of the Court of Appeal's reference to the Court of Justice, which asked:

> "2. … is it sufficient under article 8 of Directive 80/987 for a member state to have a system of protection where employees usually receive more than 50% of the value of their accrued entitlement to old-age benefits but some individual employees receive less than 50% by virtue of—
>
> . . .
>
> (b) rules limiting the annual increases in the compensation paid to employees or the annual revaluation of their entitlements prior to pension age?"

51. Relying on [27] of *Webb-Sämann v Seagon* (C-454/15) [2017] 2 C.M.L.R. 18, the Advocate-General noted that "Article 8 of the Directive refers to the protection of the entire pension entitlement acquired through contributions" (Opinion at [49]) and stated that the travaux préparatoires showed that Article 8 was "intended to ensure that it is possible to meet pension entitlements 'earned by the employee through many years' work in the undertaking'". She also referred to settled case law which characterised pension entitlements as a form of "deferred pay" (Opinion at [50]).

52. On that basis, she concluded:

> "51. If envisaged growth in the pension entitlement is not included in the calculation of the minimum protection, however, insufficient account will be taken of the contributions previously paid, as the envisaged annual increase is factored into contributions.
>
> 52. National systems of protection under Article 8 of Directive 2008/94 must therefore also guarantee growth in the entitlement in so far as over the years the guaranteed amount may not fall below 50% of the value originally accrued for a pension year.
>
> 53. The second question in its entirety must therefore be answered in the negative."

53. The Court of Justice's ruling on the breadth of protection provided by Article 8 was in the following terms:

> "1. Article 8 of Parliament and Council Directive 2008/94/EC of 22 October 2008 on the protection of employees in the event of the insolvency of their employer must be interpreted as meaning that every individual employee must receive old-age benefits corresponding to at least 50% of the value of his accrued entitlement under a supplementary occupational pension scheme in the event of his employer's insolvency."

54. Reliance was placed upon previous case law in *Robins v Secretary of State for Work and Pensions* (C-275-05) [2007] All E.R. (EC) 648*, Hogan v Minister for Social and Family Affairs* (C-398/11) [2013] 3 C.M.L.R. 746*,* and *Webb-Samann*. As the judge considered them in some detail and relied upon them in addition to the *Hampshire* decision when rejecting the Value Test, it is important to turn to them here.

55. *Robins* was the first case in which the Court of Justice considered the proper interpretation of Article 8. The claim was brought by members of defined benefit pension schemes sponsored by a company which had been placed in insolvent liquidation. During the winding up of the schemes, it became apparent that the schemes' assets would be insufficient to cover the benefits due to the scheme members. Actuarial evidence was used to demonstrate the shortfall. The payment expectation was described as 20% of the member's original entitlement under the scheme in one case and 49% in the other.

56. The claimants sued the Secretary of State alleging breach of Article 8. The High Court made a reference to the Court of Justice. First, it asked whether Article 8 required Member States to ensure that employees' accrued rights were fully funded by the State in the event of the employer's insolvency; secondly, if not, it asked whether the domestic legislation in force sufficiently implemented Article 8; and thirdly, it asked a question related to the conditions for determining whether the state was liable for damages.

57. Having noted that the actuarial evidence as to the level of benefits was "unchallenged" ([54]), the Court of Justice held that Article 8 does not require accrued pension rights to be funded in full ([46]), but that the domestic arrangements were nonetheless incompatible with Article 8:

> "57. Nevertheless, having regard to the express wish of the Community legislature, it must be held that provisions of domestic law that may, in certain cases, lead to a guarantee of benefits limited to 20% or 49% of the benefits to which an employee was entitled, that is to say, of less than half of that entitlement, cannot be considered to fall within the definition of the word 'protect' used in Article 8 of the Directive."

58. In *Hogan*, a reference was made from the High Court of Ireland. The claimants were ten former employees of Waterford Crystal, who had been required to join one of the company's defined benefit pension schemes. The company became insolvent, and, when the pension schemes were wound up, their total liabilities exceeded total assets by around €110m. Under Irish national law, where a scheme was wound up, whether because of an employer's insolvency or any other reason, members were merely entitled to a share of the assets of the pension fund. The only measure of national law adopted for the express purpose of transposing Article 8 was a rule requiring employer and employee contributions due in the 12 months prior to the insolvency to be paid into the scheme.

59. Once again, actuarial calculations were used to establish the impact of the deficit upon the former employees' benefits. The Court of Justice noted that the parties' actuaries considered that they would receive between 18% and 28% of the amounts to which they would have been entitled if they had received the present value of their accrued old-age pension rights whereas the actuary retained by Ireland considered that that percentage was between 16% and 41% ([18]). There was no criticism by the Court of the use of actuarial evidence, nor was there comment about the use of the present value of accrued rights for the purposes of the calculation, despite the terms of one of the questions referred to the Court of Justice, and recorded in its judgment at [18]. It queried how the national court should compare the employee's entitlement under the pension scheme with the amount they were actually likely to receive (and specifically the role of the state pension in that calculation). The Court of Justice held at [30] that the state pension could not be factored into the comparison, but did not provide any further comment on how to calculate the value of members' accrued pension benefits at the date of winding up.

60. The fifth and sixth questions referred to the Court of Justice asked whether the economic situation in Ireland at the time justified a lower level of protection than that established in *Robins*. The Court of Justice held that it did not. It noted at [45] that "it

is not the specific nature of the measures adopted by a Member State that determines whether that Member State has correctly fulfilled the obligations laid down in Article 8 of Directive 2008/94, but rather the outcome of those national measures". Emphasis is placed by Mr Facenna upon the use of the concept of outcomes to support the conclusion which the judge reached.

61. The seventh question in the reference asked the Court whether Ireland's failure to provide protection in excess of 49% of the value of their accrued pension benefits was a "serious breach" of the State's obligations. In that regard, the Court held:

> "51. As soon as the judgment in *Robins* [2007] 2 C.M.L.R. 13 was delivered, namely on 25 January 2007, the Member States were informed that correct transposition of Article 8 of Directive 2008/94 requires an employee to receive, in the event of the insolvency of his employer, at least half of the old-age benefits arising out of the accrued pension rights for which he has paid contributions under a supplementary occupational pension scheme."

62. Reference was also made to *Webb-Sämann.* The background to that case was rather different. The applicant's employer operated a scheme under which it withheld a proportion of his salary and converted it into pension contributions. When the employer became insolvent, it became apparent that for nine months prior to the insolvency, it had failed to pay the pension contributions to the relevant pension fund. Mr Webb-Sämann sought to recover the unpaid sums. The national court made a reference to the Court of Justice, asking whether, in the circumstances, Article 8 requires the monies which had been deducted to be ring-fenced and excluded from the insolvency proceedings.

63. The Court held that outstanding pension contributions fell within the scope of Article 8 ([24] - [25]). It noted at [27] that Article 8 "seeks to guarantee the protection of the long-term interests of employees, given that, as regards immediate or prospective entitlements, such interests extend, in principle, over the entire retirement period". However, it ultimately concluded that Article 8 did not require the contributions to be ring-fenced. *Robins* and *Hogan* had established that Article 8 requires Member States to ensure employees receive at least half of their accrued pension rights, but as there was no danger of Mr Webb-Sämann's benefits falling below that level, Article 8 did not require the State to intervene. It held:

> "35. Although the Member States thus enjoy a wide margin of appreciation when implementing Article 8 of Directive 2008/94, they are nonetheless obliged, in accordance with the objective pursued by that directive, to ensure a minimum degree of protection for employees as required by that provision. In that regard, the Court has already held that a correct transposition of Article 8 of that directive requires an employee to receive, in the event of the insolvency of his employer, at least half of the old-age benefits arising out of the accrued pension rights for which he has paid contributions under a supplementary occupational pension scheme (see, to that effect, *Robins* [2007] 2 C.M.L.R. 13 at [57], and *Hogan* [2013] 3 C.M.L.R. 27 at [51]), although that

> does not mean that, in other circumstances, the losses suffered could also, even if their percentage differs, be regarded as manifestly disproportionate in the light of the obligation to protect the interests of employees, referred to in Article 8 of that directive.
>
> 36. In this case, it is apparent from the case documents, and in particular from the information provided by Mr Webb-Sämann, that his monthly pension rights would be reduced by an amount between €5 and €7 per month, as a result of the non-payment of pension contributions during the period at issue in the main proceedings. In those circumstances, the accuracy of which must be verified by the referring court, it must be held that Article 8 of Directive 2008/94 does not require a level of protection exceeding that already granted, in this case, to the applicant in the main proceedings.
>
> 37. Therefore, insofar as a Member State fulfils the obligation to ensure the minimum level of protection required by Article 8 of Directive 2008/94, its margin of appreciation as regards the mechanism for protection of entitlements to old-age benefits under a supplementary occupational pension scheme in the event of insolvency of the employer cannot be affected."

64. We were also referred to the most recent Court of Justice cases of *Pensions-Sicherungs-Verein VVAG v Bauer* (Case C-168/18) [2020] ICR 985 and *EM v TMD Friction GmbH* (Joined Cases C-674/18 and C-675/18) [2021] ICR 212. The decision in *TMD* was handed down on 9 September 2020, after the judgment in this case.

65. In the *Bauer* case, Mr Bauer received a monthly pension direct from his previous employer, and also received a supplemental pension paid by an inter-occupational institution, the Pensionskasse für die Deutsche Wirtschaft (which was based on contributions paid by the employer). As a result of financial difficulties, the Pensionskasse reduced the pension it was paying to Mr Bauer. Initially, his employer made up the shortfall. However, the employer then entered insolvency and the German guarantee institution, PSV, assumed responsibility for paying the monthly pension Mr Bauer had previously received from his former employer, but refused to continue to make up the shortfall in amounts provided by the Pensionskasse.

66. Mr Bauer sued for that shortfall, and the national court made a reference to the Court of Justice, asking (*inter alia*): (i) whether Article 8 applied, and (ii) in what circumstances an employee's loss of pension benefits must be regarded as manifestly disproportionate under that provision. The Court of Justice answered the first question in the affirmative ([33] - [36]) and then turned to the meaning of "manifestly disproportionate". It stressed Member States' considerable latitude in determining both the means and the level of protection of employees' accrued entitlement to old-age benefits, which meant Article 8 would not prevent proportionate reductions in entitlement ([38] - [39]). It also noted the "half of old-age benefits" guarantee established in *Robins, Hogan, Webb-Sämman and Hampshire* ([41]), and the additional requirement that losses should not be "manifestly disproportionate" ([42]). It defined this as follows:

> "43. It is apparent from the Explanatory Memorandum accompanying the proposal for a Council Directive on the approximation of the laws of the member states relating to the protection of employees in the event of the insolvency of their employer of 11 April 1978 (COM(78) 141 final) that the objective pursued by that Directive was to offer protection in circumstances which represent a threat to the livelihood of an employee and his or her family. In particular, as stated in the Explanatory Memorandum, by introducing the provisions of the present article 8 of Directive 2008/94, it was the European Union legislature's intention to protect the employee from particular hardship caused by the loss of rights conferring immediate entitlement to benefits under a supplementary pension scheme.
>
> 44. It can be deduced from the above that a reduction in a former employee's old-age benefits must be regarded as being manifestly disproportionate where it follows from that reduction and, as the case may be, from how it is expected to develop, that the former employee's ability to meet his or her needs is seriously compromised. That would be the case if a reduction in old-age benefits were suffered by a former employee who, as a result of the reduction, is living, or would have to live, below the at-risk-of-poverty threshold determined by Eurostat for the member state concerned."

67. Such a reduction would be manifestly disproportionate, and therefore contrary to Article 8, even where the employee received at least half of the amount of the benefits arising from his or her acquired rights ([46]).

68. *TMD* was concerned with both the Insolvency Directive and Directive 2001/23/EC on the transfer of undertakings, and the interplay between the two, rather than with Article 8 directly. German law provided that where an undertaking was transferred after the transferor entity became insolvent, the transferee entity was liable only for pension entitlements accruing in respect of employment after the commencement of the insolvency proceedings. As to the transferring employees' pension entitlement accrued from employment up to that point, the national insolvency guarantee body – the PSV, the German equivalent of the PPF – was required to intervene and provide compensation only for pension rights that were "definitive" when the insolvency proceedings were initiated.

69. The claimant in the first case was only 29 years old at the point the transferor became insolvent, and therefore had not acquired "definitive" pension entitlement at that stage. Making a reference to the Court of Justice, one of the questions the German court asked was whether the loss in pension entitlement he would suffer from this provision was manifestly disproportionate for the purposes of the protection conferred by Article 8. The Court of Justice addressed this question at [76] - [93] of its judgment. At [77], it noted that the Member State needed to provide Article 8 protection in respect of the portion of pension entitlement that would not be covered by the transferee entity. That, it continued at [79]:

> "… requires a former employee to receive, in the event of the insolvency of his or her employer, at least half of the old-age benefits deriving from accrued pension rights under a supplementary occupational pension scheme and that that provision obliges member states to guarantee, in that event, to each former employee compensation corresponding to at least one half of the value of his or her rights conferring immediate entitlement under such a scheme".

70. The Court addressed the aim and extent of the Article 8 protection again and stated:

> "81. It must be added that the aim of article 8 of Directive 2008/94 is to ensure that the long-term interests of employees are protected, given that such interests, with respect to rights conferring immediate or prospective entitlement, extend, in principle, over the entire retirement period (*Webb-Samann v Seagon* (Case C-454/15) [2017] 2 CMLR 18, para 27)."

71. Turning to the provision of German law precluding compensation for pension entitlements that were not "definitive" at the point insolvency proceedings were initiated, the Court concluded:

> "91… the Directive does not preclude a member state from treating as a different category of rights conferring prospective entitlement those which are definitive. However, the recognition that member states have such a discretion cannot have the result that the effectiveness of the provisions of that Directive, particularly article 8 of that Directive, is undermined. That would be the case if a member state were permitted to exclude certain categories of rights conferring prospective entitlement, within the meaning of its domestic law, from the scope of the obligation to ensure minimum protection that is imposed, under article 3(4)(b) of Directive 2001/23, read in the light of article 8 of Directive 2008/94, with respect to all rights conferring prospective entitlement.
>
> 92. Ultimately, it is for the referring court to determine, having regard to the principles set out in the preceding paragraphs of the present judgment, whether, in the disputes in the main proceedings, the obligation to ensure a minimum protection of employees who qualify for benefits under a supplementary occupational pension scheme has been disregarded."

Discussion

72. Having considered Article 8 and the case law which interprets it, we agree with Miss Stratford, on behalf of the PPF, that the judge erred in his rejection of the Value Test on the basis of the "indications" in the case law. We have come to this conclusion for a number of reasons.

73. Before turning to our reasons, we should mention that we disagree with Miss Stratford's characterisation of the Claimants' criticisms of the Value Test. She described them as complaints about method and implementation and, therefore, as impermissible as a result of the latitude afforded under Article 8 and recognised in the case law. She pointed out that there was no challenge to the actuarial assumptions which underlie the actuarial valuation used in order to determine the value of the employee or former employee's accrued rights under the pension scheme in question.

74. It seems to us that that characterisation is an attempt to cloud the real nature of the issues in the PPF appeal and the judge's approach. Although the Claimants' criticisms are focussed, inevitably, upon the effects of the Value Test, they are not merely as to the means by which the necessary protection is delivered. As the judge well understood, they go to whether the nature of the protection afforded by Article 8 as interpreted in the case law, is, in fact, delivered in each individual case. Of course, latitude afforded in matters of implementation cannot assist, if, in fact, the PPF scheme, in principle, fails to provide the level of protection required.

75. To return to our reasoning, first, we note that as Miss Stratford pointed out, Article 8 itself is very general, open-textured and broad. No one has suggested otherwise. It seems to us that this is in keeping with the use of a directive and the structure of the Directive itself. The breadth of the wording is indicative of the "considerable latitude" or "considerable discretion" in implementing its requirements which has been afforded to Members States and is referred to in the case law. For example, see: *Robins* at [45] and [74]; *Hogan* at [42]; *Webb-Samann* at [34]; *Hampshire* at [41] and [61]; *Bauer* at [38]; and *TMD* at [78].

76. Secondly, Article 8 itself requires Member States to "ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits . . . under supplementary occupational . . . pension schemes . . ." (emphasis added). Although it is necessary, obviously, to be guided by the Court of Justice case law interpreting Article 8, it seems to us, that it is important to note, in principle, that the terms of Article 8 refer to an employee or former employee's interest in their rights to pension benefits rather than the benefits themselves. Furthermore, the words used are consistent with protection of existing interests in benefits payable in the future, in relation to the future income stream, whether in the case of the former employee who is already drawing a pension under an occupational scheme, of the employee whose working life has been cut short by the insolvency of the employer and has yet to draw a pension, or of the former employee who has long since left the employment of the company in question, but has accrued rights to future benefits. It is those "interests", some of which remain prospective at the date upon which the PPF takes on the obligation to pay compensation, which must be protected.

77. Thirdly, with that context in mind, it seems to us that having analysed the case law meticulously, the judge, nevertheless, misunderstood what he described as the "indications" which can be gleaned from the way in which the Court of Justice has interpreted Article 8. As the judge pointed out, none of the cases are concerned with the questions which he had to answer. However, we do not consider that the way in which the Court of Justice approached the various issues with which it was concerned leads to the conclusion that the obligation is to provide at least 50% of the "actual value,

over time, of the benefits" as opposed to their "actuarially predicted value" as the judge held ([187]) and requires the rejection of the one-off Value Test in favour of a test which re-visits the value placed on the accrued entitlement from time to time, and re-values what has been paid and might have been paid, retrospectively, such as the Lifetime Payments Test.

78. Whilst accepting that it would be open to the PPF to proceed, initially, on the basis of an actuarial valuation of the employee or former employee's rights, the judge propounded a test which requires the PPF to check at unspecified times (and ultimately at the end of the pension period) whether that valuation, is, in fact, delivering (or has delivered) at least 50% of the value of the actual benefits which would have been provided had the insolvency never happened and the employee or former employee had been paid benefits under the employer's scheme, and to top up the compensation, if necessary. As we have already mentioned, this is the effect of the judge's reference to the "cumulative value of benefits" at [190] and [191]. It requires a retrospective valuation or valuations to be carried out to ensure that the at least 50% floor had been maintained overall.

79. Mr Facenna described the judge's point, at paragraph 47 of the Claimants' skeleton argument, as a recognition that the amount actually payable to a member of a pension scheme over their lifetime, in accordance with the scheme rules and the member's personal circumstances (but for the insolvency), is different from an actuarial value of those present and future entitlements at a particular point in time, being the date on which the assessment takes place.

80. Before turning to the cases, we should make clear that if such an approach is required, it is irrelevant that it may be less administratively convenient than the Value Test or that it may cost more to administer, or for that matter, more to deliver. See, for example, *Hogan* at [46] and [47]. Accordingly, we leave those matters out of account.

81. As we have already mentioned, in our judgment, the judge was wrong to conclude that such a cross check and top up, where necessary, is required. The "indications" in the case law point in the opposite direction.

82. If the judgment in *Hampshire*, including its references to previous case law, is read as a whole, it is clear that Article 8 must be interpreted as meaning that every employee or former employee must receive compensation corresponding to at least half of the value of his accrued entitlement under the original pension scheme, taking into account the envisaged growth in that entitlement over the entire pension period ([51]). The Court of Justice uses a formulation by reference to "value" of a person's "accrued entitlement" in [50], [51] and [52]. This is consistent with a single forward-looking determination of value. As the judge himself pointed out at [179] of his judgment, there are times when the language used by the Court of Justice is entirely consistent with "a calculation of the value at a particular point in time of accrued future entitlement." In other words, the language is consistent with a single prospective valuation of pension rights.

83. Furthermore, at [51] of *Hampshire*, express reference is made to the "value" of the "accrued entitlement" being "calculated taking into account the envisaged growth in the pension entitlement" throughout the entire pension period "in order to prevent, as a result of the passage of time, the amount guaranteed falling below 50% of the initial

value accrued for one pension year" (emphasis added). The use of "envisaged growth in the pension entitlement throughout the entire pension period" and "initial value" in conjunction with "value" and "accrued entitlement" is also consistent with a forward-looking valuation of accrued rights, including rights to revaluation of deferred pension entitlement and pension indexation in respect of pensions in payment, throughout the period of future payment, taking place on a single date. There is no indication in *Hampshire* that it is necessary to value the accrued entitlement more than once.

84. It seems to us that had the Court of Justice intended the cross check to actual benefits in order to determine an "actual value" from time to time which the Lifetime Payments Test requires, it would not have referred to the value of the employee's accrued entitlement, nor to the calculation of that value taking account of envisaged growth. That process is indicative of a single prospective valuation of rights on one occasion. Had the Court intended a cross check and top up from time to time, by reference to what would have been payable on the basis of the counter-factual of the individual's circumstances under the original scheme had it still existed at the time of the cross check, it seems to us that it would have used very different language. For example, it would have been more likely to have used the term "amount" rather than "value" and would have made express reference to the benefits themselves instead of "accrued entitlement". It would also have referred to growth and actual circumstances over the lifetime of the pension rather than "envisaged growth", to which we return below.

85. We do not find it surprising that the term "value" is used in conjunction with reference to the employee's "accrued entitlement". The concept of value is apt in the context of the exercise which Article 8, as interpreted by the case law, requires. A comparison of two future income streams must be undertaken in order to determine that the value of one is not less than 50% of the other. That comparison can only be carried out by reference to value and the value of such a prospective right can only be determined by the use of a sophisticated range of actuarial assumptions, in order to take account of many relevant factors including, for example, the value of money over time. We agree with Miss Stratford, therefore, that the judge's preference for "actual value over time" over "actuarially predicted value" is a chimera. The value of an accrued entitlement to a future income stream which is arrived at by the use of actuarial techniques and takes account of revaluation and indexation is the actual value of that entitlement rather than a prediction.

86. We agree, therefore, with Miss Stratford that the judge was wrong to seek to distinguish between "actual value over time" and "actuarially predicted value". If Article 8 requires a prospective comparison of rights, the only realistic means of carrying out the comparison is by using actuarial assumptions. A value obtained by the use of such an assumption is the actual value of the prospective income stream. There is no other way of determining it. Accordingly, the actual value is the value derived by the use of actuarial assumptions.

87. We respectfully suggest that there is no basis for the judge's use of language at the end of [181] of the judgment where he states that: "[T]he guarantee is intended to ensure that the sums that the member receives will equal 50% of the amounts, over time, that the member would have received under the pension scheme." (emphasis added). This feeds in to his reasoning at [187]. The repeated use of the "value" and "accrued entitlement" is entirely inconsistent with a test based upon the "amounts" which would

have been received. Furthermore, to take into account actual amounts received and to be received at any particular point would be a crude and inaccurate comparison.

88. Mr Facenna's real complaint before us is that in individual cases, the actuarial assumptions used in order to determine the relative value of the employee's accrued entitlement under the scheme and the PPF benefits, will prove to be wrong and in some cases, the employee will lose out because, for example, he lives beyond his actuarially determined date of death or rates of inflation change.

89. It seems that it was these circumstances which caused the judge to make reference to the "cumulative value of the pension benefits" which would have been received at [186], [190] and [191] of his judgment. However, it is almost inevitable that some of the demographic and economic assumptions which are used in the process of determining and comparing the value of two future income streams will prove inaccurate, and may well do so very quickly after the value is arrived at. (This was accepted in the evidence before the judge.) That does not render a prospective comparison invalid in any way.

90. The year-on-year approach having been rejected by the judge and abandoned by the Claimants, the real question is whether Article 8 requires those actuarial assumptions to be re-visited and updated from time to time. It must be borne in mind, however, that if it is necessary to re-assess the values attributed to the accrued entitlement and the PPF benefits, with the benefit of hindsight, such an exercise, inevitably, will itself be achieved by the means of an actuarial valuation which will be subject to a whole range of assumptions which may also prove to be inaccurate. One would need to compare the present value of what would have been received under the occupational scheme in the past and has been received from the PPF by reference to the value of money over time. It is not a straight comparison of sums received and any test based upon the cumulative value of benefits, ultimately, can only be satisfied at the end of the pension period. We also note, as Miss Stratford points out, if retrospective valuations are necessary, it follows that a system of compensation by way of a lump sum payment would be precluded. Yet there is nothing in the decisions of the Court of Justice which indicates that such compensation would not comply with Article 8.

91. To return to the Court's decision in *Hampshire*, it is important to note that its conclusions at [50] – [52] in which emphasis is placed upon "value" come after it had noted that the Court had confirmed its approach in *Robins*, and in *Hogan.* It noted at [43] and [44] of *Hampshire* that in *Robins* it was held that domestic law which, in certain cases, led to a guarantee of benefits limited to less than half of the "entitlement accrued" cannot be considered to fall within the word "protect" and that that case concerned entitlement to benefits of two former employees who have received only 20% and 49% respectively of the old-age benefits to which they were entitled. Those percentages had been reached with the benefit of an actuarial valuation which was not challenged. (*Robins* at [54]).

92. Further, we do not consider that the use of the term "old-age benefits" in *Hampshire* is any indicator that the judge's cumulative benefits approach is required. At [45] in *Hampshire* the Court noted that the interpretation in *Robins* had been confirmed in *Hogan* at [43] and [51] where the Court held that Article 8 requires an employee to receive "at least half the old-age benefits arising out of the accrued pension rights for which he has paid contributions . . .". It went on to use the term at [52] in a passage

which provides that Article 8 must be interpreted as meaning that every individual must receive "old-age benefits corresponding to at least 50% of the value of his accrued entitlement. . ." It seems to us, therefore, that it is directly connected to and dependent upon the value of the accrued entitlement and is merely shorthand for the sums received. It does not have an additional, freestanding meaning.

93. The same is true in relation to the use of the term "old-age benefits" in the most recent case of *TMD* at [79] which we set out at [69] above. The phrase is used in that paragraph in the same passage referring to the "value" of the employee's rights. It is merely shorthand for what is payable to the member.

94. Furthermore, it seems to us that the judge was also misled by the references to "protection which lasts for the entire pension period" and "envisaged growth in the pension entitlement throughout that period" at [51] of the *Hampshire* decision which have since been repeated in the *TMD* case at [81]. In *Hampshire* these phrases were used by the Court when endorsing the approach proposed by Advocate General Kokott in her opinion at points 48 – 53. As we have explained, the Advocate General's opinion in this regard arose from the question which had been posed by this court in relation to the effects of rules limiting annual increases in compensation paid to employees in comparison with the annual revaluation of their entitlements prior to pension age.

95. The Advocate General was pointing out the need to protect the entire pension entitlement acquired through contributions and noted that it is settled case law that the Court regards the pension entitlement of employees under a supplementary occupational pension as a form of "deferred pay" ([AG 50]). She went on to make clear that if envisaged growth in the pension entitlement was not taken into account in the calculation of the minimum protection, insufficient account would have been taken of the contributions which had been paid because the cost of annual increases had been factored in to the level of contributions. It was for that reason that she opined that national systems of protection must also guarantee growth in the entitlement "insofar as over the years the guaranteed amount may not fall below 50% of the value originally accrued for a pension year". ([AG 51 and 52]). It is by this means that the entire pension entitlement, intended to last over the pension period, is protected.

96. Even if this is taken together with references to the protection of the long-term interests of employees over the entire retirement period in *Webb-Samann* at [27] and most recently at [81] of *TMD*, we do not consider that these are sufficient to amount to an indication that a one-off determination of value over the entire retirement period must be re-visited from time to time or be subject to an ex post facto comparison, as the judge held. The consistent use of the terms "value", "accrued entitlement" and "envisaged growth" are strong indicators in the other direction.

97. We consider the same to be true in relation to the use of the word "outcome" at [45] of *Hogan*. It cannot bear the weight which Mr Facenna would like to place upon it. As the judge pointed out at [165] of his judgment, the word was used in the context of questions asking if the guarantee was to be 50% or whether it could be lower where a state adopted measures because of the economic situation which lead to less than 50% protection. It was not focused on the issues arising in the case as presented before the judge or on appeal.

98. Even if we are wrong about the interpretation of the reference in the cases to "old-age benefits" and protection over the entire retirement period, in our judgment neither the phrase nor the intention can take the weight which the judge's conclusions would require them to bear.

99. Furthermore, we note that if revaluation from time to time were necessary, it would be impossible to be certain that the obligation under Article 8 had been fulfilled until the death of each employee. It would only be possible at that stage to be satisfied that the actuarial assumptions used in the original valuation and on subsequent occasions chosen by the PPF, during the entire retirement period, had, in fact, delivered the required level of protection, despite, for example, changes in inflation and the actual lifespan of the employee.

100. We accept that it would be possible for the employee's personal representatives to pursue a claim at that stage (see by way of analogy *Stadt Wuppertal v Bauer, Willermoth v Broßon* (Joined Cases C-569/16 & C- 570/16) [2019] 1 C.M.L.R. 36), although we note that a final conclusion on the value of cumulative benefits might only be possible once any survivor has also died. We also accept that it would be possible for the employees themselves to pursue a claim against the PPF at any stage during payment of the PPF compensation if they considered that the at least 50% obligation has been breached. It follows, therefore, that we reject Miss Stratford's submissions to the effect that once further valuations, after the initial determination of value has been arrived at, are required, the obligation under Article 8 becomes shapeless and unenforceable, and that an obligation which can only be satisfied or fulfilment of which can only be confirmed with hindsight on death, is no obligation or test at all. However, we observe that such an obligation, implemented by the Lifetime Payments Test, would prove more difficult to enforce.

101. For the sake of completeness, we should mention that Miss Stratford also referred us to the use of actuarial valuations in a variety of different circumstances including under section 224 and 143 of the Act. As it is not disputed that the PPF is entitled to commence by using an actuarial valuation in order to determine the value of the packages of accrued rights and PPF benefits at the outset, it does not seem to us that it is relevant or useful to set out those different circumstances here. Suffice it to say that it is not controversial to say that actuarial valuations, based on demographic and economic assumptions as to the future, are the bread and butter of the pensions sector. They are the way in which the value of future income streams is measured for a wide variety of purposes. As Mr Facenna pointed out, in some of those circumstances, including some of those which arise under section 74(3) Pensions Act 1995 where a scheme is being wound up, the discharge of the trustees in respect of a member's pension benefits by the acquisition of other rights is subject to actuarial certification and the fiduciary duties of the pension scheme trustees. We do not consider that this takes the matter any further.

102. In conclusion, therefore, we consider that the judge erred [181], [187], [190] and [191]. In our judgment, the PPF is not required to adopt a Lifetime Payments Test and is entitled to use a Value Test as long as that one-off comparison satisfies the obligation imposed by Article 8 as interpreted in the case law.

103. We would add one caveat. There is no challenge in this appeal to the assumptions used by the PPF actuaries to calculate the appropriate levels of compensation. We therefore do not express any view in relation to the underlying assumptions used in the PPF

calculations nor are we in a position to do so. However, the conclusion that we have reached which is that it is lawful for the PPF to perform a single, ex ante, calculation does not mean that in principle the calculation is immune from challenge. We express no view as to how finely tuned the actuarial assumptions used in the PPF calculation must be to reality, or how broad or narrow might be any margin of judgment or discretion the PPF has in adopting such assumptions.

Second Issue - Survivors

104. The second issue is whether Article 8 requires payment of an amount equivalent to no less than 50% of the benefits which the survivor of a member would have received under the relevant pension scheme.

The evidence about survivors' benefits

105. The judge considered the limited evidence which was available about survivors at [35] and [40]. In the T & N Scheme, survivors were entitled to half of the member's pension, ignoring the exercise by the member of any option to commute part of his pension into a lump sum. Mrs Forsyth received half of her husband's capped pension from the PPF. His election to commute part of his pension was also taken into account in the calculation of Mrs Forsyth's compensation, and reduced it. In the HLG Scheme, survivors were entitled to pensions calculated in the same way. Mrs Mackenzie-Green's compensation was calculated in a similar way to that paid to Mrs Forsyth. Under the HLG Scheme she would also have been entitled to a lump sum. She did not receive a lump sum from the PPF. Again, these figures did not apparently take account of the future impact of the Decision, but even if that was taken into account, the compensation paid to survivors who were entitled, under the relevant scheme, to half of their spouse's benefits, would amount to about a quarter of the benefits they would have received from the relevant scheme, and, in the case of schemes which paid more than half of the member's benefits to a surviving spouse (for example, 2/3), to even less than that. The extent of the disparity is, of course, influenced by whether or the not the cap is lawful. We have held that it is not, and, to that extent, the disparity is reduced.

The PPF's method of dealing with survivors' benefits

106. As we have already mentioned, the judge noted that the PPF uses assumptions about whether a member would die leaving a survivor, and built that into its calculation of the value of the member's benefits at [59]. The PPF contended that that ensured that the compensation paid to a member included 50% of the value of his or her benefits (including the value of benefits payable to survivors). The actual compensation paid to survivors is 50% of the annual periodic payment of compensation due to the member at his or her death. The claimants argued that that meant that a survivor might get less than he or she would have received from the relevant scheme. They also argued that some survivors do, or may, receive less than 50% of that amount. There was no evidence before the court, however, about what would have been paid to any of the survivors under the four relevant schemes. The parties' approach was that these were issues of legal principle. The judge said that it would have been better if there had been some facts against which to resolve those issues.

The Judge's reasoning on survivors' benefits

107. As we have already mentioned, the judge's conclusion was that the approach of the PPF was "wrong in principle" [193]. We have set out his reasoning at [31] and [32] above.

108. In short, the judge said that Article 8 was concerned with protecting the rights of employees, but it specifically recognised that those rights included survivors' benefits; the entitlement to those benefits derived from rights acquired by the member and were funded by contributions made by him and by his employer; those benefits were intended to make financial provision for the survivor during her lifetime; and

> "'…the benefits themselves are intended to be enjoyed by the survivor after that member's death. They are intended to make financial provision for the survivor during her lifetime. The obligation "to protect the interests of employees" applies to the payments made to survivors. Just as the payment of less than 50% of the value of the pension benefits during the member's lifetime would not be considered to "fall within the definition of the word 'protect'" (see per the Court of Justice at [57] of its judgment in Robins), payment of an amount that is equivalent to less than 50% of the benefits which would be paid to the survivor would not provide protection of survivors' benefits.'" [194]

109. As we have already mentioned, the judge noted that his approach to Article 8 was consistent with the approach of the Court of Justice in the *Ten Oever* case and concluded that the "guarantee would require them to receive compensation equal to 50% of half of the spouse's pension calculated in accordance with the relevant scheme" [196]. He noted, however, that he was not in a position to decide whether or not the PPF's method would achieve that.

The submissions on survivors' benefits

110. Miss Stratford, for the PPF, explained that the judge's decision on survivors' benefits would cost about £1bn to implement. It is not clear to us whether that figure takes into account the Judge's ruling on the cap, or not. She explained that whether the decision would affect the amount of the levy was more complicated, but that there would be an effect. She submitted that the judge gave two reasons for his conclusions on survivors' benefits. They were that members paid contributions to secure them, and that, therefore, 50% of the benefits should be paid, and survivors had a directly effective right to survivors' benefits, which was covered by the Article 8 guarantee. Both reasons were wrong. She emphasised that the Decision, which implements *Hampshire* through the Value Test, brought survivors' benefits fully into account. Any shortfall in survivors' benefits would be addressed by the Hampshire Uplift.

111. The tacit, and flawed, premise of the judge's first reason was that members must receive not less than 50% of each element of their entitlements under their scheme, rather than 50% of the value of the benefits as a whole. The Judge's second reason was wrong because it was contrary to the language of Article 8 and not supported by any authority. Article 8 protected a bundle of rights which belonged to the employee, but did not require each component of that bundle of rights to be separately protected.

Discussion

112. For the sake of consistency and clarity, the judge referred to survivors as "she" and to the employee/member as 'he'. We shall do the same.

113. It is important to appreciate that this issue is concerned solely with the treatment of any survivor of an employee/member who was receiving compensation from the PPF at the date of his death. It is not concerned with the position of a survivor who is already receiving a pension from an occupational scheme before the employer becomes insolvent. Such a person is treated in the same way as any other pensioner who, immediately before the assessment date, is receiving a pension from an occupational scheme. Those survivors become entitled to compensation under the PPF scheme pursuant to paragraph 3 of Schedule 7 to the Act: see the judgment at [17]. The survivors to whom this issue relates become entitled to compensation under the PPF Scheme on the death of the member/employee who has also been in receipt of PPF compensation. The compensation payable to her is half of the annual rate of the periodic compensation (including any increases) to which the pensioner would have been entitled had he not died: Schedule 7 paragraph 4, and [24] of the judgment.

114. Did the judge err in concluding that Article 8 requires, on the death of a member who was receiving compensation from the PPF, the payment to his survivor of an amount which is no less than 50% of the benefits which she would have received under the rules of the relevant occupational pension scheme? In practice, the answer, on the facts of this case, depends on whether Article 8 requires the PPF, on the death of the member in receipt of compensation, to conduct a freestanding assessment to ensure that the survivor receives such compensation.

115. This issue is not only of considerable importance to the PPF. It is also potentially very important both to Mrs Forsyth and Mrs Mackenzie-Green, as we have already explained, in paragraph 105, above.

116. In order to decide this issue, we must answer two main questions.

    i) Who can enforce rights to survivors' benefits?

    ii) What is the content of those rights?

Who can enforce rights to survivors' benefits?

117. We consider, first, who can enforce rights to survivors' benefits. Does Article 8 confer a directly effective right on survivors? The PPF contends that if the judge found that survivors do have such a right, he was wrong to do so, because the identity of survivors is not unconditional or sufficiently precise. The PPF also argues that section 4(2)(b) of the 2018 Act means that it is now too late for this Court to recognise such a right.

118. In the *Hampshire* case, the Court of Justice held that Article 8 had direct effect. In other words, its provisions were unconditional, and precise enough, as respects members, at least, to be relied on by individuals against member states and their institutions [54]. The Court of Justice considered that an employee such as Mr Hampshire was able to invoke Article 8 against the PPF [67]. It is at least clear from *Hampshire*, therefore, that

the rights referred to in article 8 (including survivors' benefits) are directly effective rights for members.

119. The Court of Justice did not have to consider whether Article 8 conferred directly effective rights on survivors. Unsurprisingly, therefore, there is nothing in the reasoning of the Court of Justice which expressly deals with their position. It follows that it is not possible to deduce from *Hampshire* that survivors do, or do not, have directly effective rights. However, we consider that the reasoning of the Court of Justice in paragraphs 18 and 19 of *Coloroll Pension Trustees Limited v Russell* Case C-200-91 [1995] ICR 179 provides strong analogical support for the proposition that survivors have directly effective rights in this context, as does the reasoning of the Court of Justice in *Ten Oever*.

120. *Coloroll* concerned the principle of equal pay pursuant to Article 119 of the EEC Treaty and its application to pensions. We were referred, in particular, to [18] and [19] of the judgment of the Court of Justice. They are as follows:

> "18. As regards the first part of the question, the court, in *Ten Oever*…held that a survivor's pension provided for by an occupational pension scheme fell within the scope of article 119. It also held... that the fact that such a pension, by definition, was not paid to the employee but to the employee's survivor did not affect that interpretation because, such a benefit being an advantage deriving from the survivor's spouse's membership of the scheme, the pension was vested in the survivor by reason of the employment relationship between the employer and the survivor's spouse and was paid to the survivor by reason of the spouse's employment.
>
> 19. It follows that, since the right to payment of a survivor's pension arises at the time of the death of the employee affiliated to the scheme, the survivor is the only person who can assert it. If the survivor were to be denied that possibility, that would deprive article 119 of all its effectiveness as far as survivors' pension are concerned."

121. The Court went on to explain that the principle of equal pay pursuant to Article 119 may be relied upon against the trustees of the pension scheme and that the trustees are required to pay benefits which do not lose their character as pay within the meaning of Article 119 although the trustees themselves are not party to the employment relationship ([20] – [23]) and concluded:

> "[24] . . . the direct effect of article 119 of the EEC Treaty may be relied upon by both employees and their dependants against the trustees of an occupational pension scheme who are bound, in the exercise of their powers, and performance of their obligations as laid down in the trust deed, to observe the principal of equal treatment."

Ten Oever concerned, among other things, sex discrimination and equal pay in relation to pensions payable under a pension scheme. We have already quoted paragraphs 11-13 of the judgment in [32], above.

122. Is the identity of survivors sufficiently precise to enable them to have a directly effective right under Article 8? It is helpful to consider this question in stages. At the date of the insolvency/the date when the PPF assumes responsibility for a scheme, all relevant pensioners are identifiable, and have directly effective rights pursuant to the decision in *Hampshire*. The same is true of survivors who were receiving survivors' benefits at that date. They too were pensioners. They can be identified, and their rights under the scheme have vested. As we have already mentioned, we are not concerned with that group of survivors.

123. At the date of insolvency, however, there are other potential beneficiaries, including those who might in the future have become entitled to survivor's benefits under the rules of the relevant scheme. They cannot be identified because they may not yet have become a spouse or if they are already a spouse, their rights remain contingent upon them surviving the member. At that point, therefore, they do not have directly effective rights. They are not identifiable.

124. However, thereafter, those who would have been entitled to survivors' benefits under the scheme rules will become identifiable, as and when the pensioner, employee or ex-employee from whom they would have derived their right to survivor's benefits, dies. At that point (but not before), they become identifiable and as a result of Article 8 and the analogy with *Coloroll* and *Ten Oever*, have directly effective rights. We do not consider that it matters that their rights had not vested at the date of insolvency. The protection conferred by Article 8 is forward-looking, and the obligation to protect the relevant interests is not exhausted, once and for all, at the date of the insolvency.

125. We therefore agree with the PPF that at any particular point in time, there will always be some potential survivors whose identity is not unconditional, or sufficiently precise. Indeed, as the PPF submitted, the contingent right to survivors' benefits (as opposed to compensation) may also be defeasible, because the member could commute that right, or transfer his contributions to another scheme which did not provide survivors' benefits. It obviously follows that, at that point, those potential survivors cannot have a directly effective right. It is a non sequitur, however, to conclude that no survivors can have such rights, as we have explained above. In our judgment once a former member of a scheme, who was receiving compensation from the PPF has died, then, if he has a survivor, that survivor becomes identifiable, and, from that moment, has a directly effective right.

What is the content of that directly effective right?

126. What is the content of that directly effective right? The starting point is the Directive, and Article 8, in particular. The Directive is concerned with the protection of employees' rights and claims. Article 8 requires member states to "…protect the interests of employees…in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits…" The word "survivors" is linked with their (that is, the survivors'), benefits, but in the context of the employees' interests in respect of the employees' pension entitlement. Article 8 does not refer to the rights or interests of survivors. The protection is conferred in

relation to the employee's interests, in the form of their entitlements to old age benefits. That entitlement "includes" survivor benefits, which, by their very nature, are contingent and form part of the employee's entitlement at the point of insolvency. It seems to us that had it been intended to give freestanding protection to survivor's rights, the obligation in Article 8 would have been expressed differently. Not only does it not refer to survivors' rights (as opposed to benefits), but also the word "including" is inapposite to describe a freestanding entitlement of the survivors to benefits.

127. Further, all of the case law to which we have referred focusses on the value of the employee's or former employee's "accrued entitlement". We acknowledge that this is not decisive, because none of the cases concerned survivors' benefits, but this phrase does in this respect reflect the language of Article 8. Survivors (who are not already pensioners) who become entitled to compensation from the PPF do not, at the point of insolvency, have their own accrued entitlement under the occupational scheme to which the member/employee belonged.

128. We do not consider that that position is altered by the recent statement in *Pensions-Sicherungs-Verein VVaG v Bauer* (Case C-168/18) [2020] ICR 985 at [43], to which Mr Facenna referred, that the objective of the Directive was "to offer protection in circumstances which represent a threat to the livelihood of an employee and his or her family." The fact that *Bauer* did not concern survivors' benefits, but rather, the benefits being paid to a pensioner, makes it unlikely that that passage is, or could have been intended to be, a statement about what rights, if any, Article 8 confers on survivors.

129. Further, that paragraph continues as follows:

> "…In particular, as stated in the Explanatory Memorandum, by introducing the provision of the present article 8 of the Directive 2008/94, it was the European Union legislature's intention to protect the employee from particular hardship caused by the loss of rights conferring immediate entitlement to benefits under a supplementary pension scheme."

130. In our judgment, it is clear, if the paragraph is read as a whole, that the reference to an employee's family is a general one, and that it is not intended to describe a freestanding right in the survivor to the "at least 50% protection" in relation to the pension which they would have received under the original scheme as a result of the accrued entitlement of the employee himself. It is a general reference to the threat posed to the livelihood of the employee and his family by the insolvency of the employer and the consequent loss of the employee's pension benefits.

131. We agree with the judge that the contributions which the employee or former employee paid to his occupational pension scheme, or which were paid on his or her behalf, will have been calculated on the basis of the contingency that survivors' benefits might become payable, and on the basis of the particular benefits afforded to survivors under the rules of that scheme. As Miss Stratford points out, however, the Value Test which is applied when the member/employee becomes entitled to compensation under the PPF brings survivors' benefits fully into account. They are valued as part of the basket of benefits for which the employee or former employee has paid and to which he has an accrued entitlement. So they are taken into account when determining the overall value of that entitlement. Further, there is no question of the employee having paid for

something by way of contributions to the occupational scheme which he, or, on his death, his survivor does not receive by way of compensation. The survivors' benefits (which are contingent on the death of the employee and on the existence of the survivor at that date) are part and parcel of the employee's accrued rights which are valued on the assessment date, and the PPF then pays the survivor, if any, half of the compensation which the member was receiving at his death.

132. We have already held that Article 8, as interpreted by the Court of Justice, permits a member state to set up a compensation scheme which provides an employee with at least 50% of the value of his accrued entitlements, that it is open to a member state to carry out the valuation of those entitlements once and for all at the date of insolvency, and to use actuarial methods for that purpose.

133. We consider that the same reasoning applies to survivors' benefits, which derive from the employee's rights under the scheme, and which are, at the date of insolvency, a contingent part of the parcel of rights which employee and employer have paid contributions to secure. It is open to a member state, it seems to us, also to value survivors' benefits on the assessment date, in a way which factors in the actual benefits conferred on a survivor by the rules of the particular scheme, as part the individualised actuarial assessment of the value of the employee's rights at that date. The fact that the employee/member has paid for a parcel of rights, which includes a right for his survivor (if, in the event, he has one) to receive a pension on his death, does not, however, lead to the conclusion that it is necessary to carry out an additional and standalone valuation when the employee dies, in order to ensure that the survivor receives compensation, the value of which will not fall below 50% of what would have been the survivor's benefits under the relevant occupational scheme.

134. As Miss Stratford points out in her written argument, the premise of the judge's approach is that the obligation imposed by Article 8 requires the member to receive no less than 50% of each separate element of the member's accrued entitlement. We consider that there is no basis in the Directive, in Article 8, or in the case law, to suggest that the accrued entitlement is divisible and that each element should be valued and treated separately. Further, if the judge's approach were correct, it would be necessary to strip out the value of the survivor's rights when arriving at the value of the employee's accrued entitlement, in order to avoid double counting.

135. At the date of insolvency, the survivors' rights remain inchoate. They form part of, or, to put it in the words of Article 8, are "included" in the employee's entitlement. They are qualitatively different, in our judgment, from the content of the directly effective right which is conferred upon the survivor on the death of the spouse (who was in receipt of compensation). That right is to receive at least 50% of the compensation which her spouse was receiving. There is no right to return to the drawing board and calculate the survivor's compensation on the basis of the rules of the original scheme.

Conclusion on survivors' benefits

136. We give permission to appeal on this ground. For the reasons given above, we consider that the judge erred in deciding that the PPF's approach to survivors' rights is "wrong in principle". We therefore allow the PPF's appeal on this ground.

Secretary of State's Appeal

Ground I: Delay / timing

(i) The Issue

137. The judge held that the challenge to the cap was brought substantially out of time under CPR rule 54.5(1). The grounds for bringing the claim first arose when the individual claimants were first affected by the relevant statutory provisions, which was when their employer became insolvent and their pension scheme entered the PPF assessment period [91-92]. He also accepted that the Claimants had not specifically served witness statements explaining the delay, nor had they formally applied for an extension. Nonetheless the Judge, exercising his discretion, granted the extension of time necessary to enable the claim to continue.

138. The Secretary of State challenges this conclusion. The PPF does not. The Claimants have not sought to appeal the judge's conclusion that they were *prima facie* out of time. It is also common ground that the due formalities were not adhered to.

(ii) Submissions of parties

139. The arguments of the Secretary of State focused upon the failure of the Claimants to adhere to the due formalities, namely the making of a formal application and the service of explanatory evidence explaining the delay, and as the implications of this.

140. The argument can be summarised as follows.

141. First, the failure to serve a formal application for an extension of time should have been treated as fatal to the claim: see eg *R (Delve) v SSWP* ("*Delve*") [2020] EWCA Civ 1199 at [124-127]. This case concerned an age and sex discrimination challenge under both ECHR and EU law to primary legislation which changed the state pension age. The claim was brought many years out of time. The Court emphasised the need for a formal application supported by relevant evidence. Further, under CPR PD54A, §§5.6(3) and 5.7(1) the claim form itself "*must*" be accompanied by an application to extend the time limit for filing the claim form and "*any written evidence*". The Administrative Court Judicial Review Guide (2019) also notes at §5.4.4.3 that the Court will require evidence explaining the delay and will only extend time if an adequate explanation is given for the delay.

142. Secondly, it is said that the judge erred in simply asking himself whether there was a "*good reason*" for extending time under CPR rule 3.1(2) [97]. The test that should have been applied is the same as under an application for relief from sanctions under CPR rule 3.9: *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 272 [36]; *R (Fayed) v Secretary of State for the Home Department* [2018] EWCA Civ 54 at [22]. The judge failed to apply the three-stage test restated in *Denton v TH White Ltd* [2014] 1 WLR 3926 ("*Denton*"). Had the judge considered the matter by reference to *Denton* he would have been bound to refuse the application for an extension.

143. Thirdly, the Claimants' failings were serious and significant. The issue of limitation had been raised in pre-action correspondence. A request for an extension of time was belatedly made, but only in the skeleton argument, and it was unsupported by evidence

or explanation for the non-compliance. Had the claim been refused this could have removed the part of the claim (relating to the legality of the cap) for which the Secretary of State was responsible.

144. Fourthly, the judge failed to consider the public interest in the need to enforce compliance with procedural rules and the need for litigation to be conducted efficiently and at proportionate cost. Instead, he focussed upon whether other private law claims might be brought in the future which would raise the same or similar issues: Judgment, [98]-[102]. This was a factor the judge should have ignored since it undermined the very time limit itself: see eg the Divisional Court in *R v HMRC ex p Eurotunnel* [1995] CLC 392 at [401] ("*Eurotunnel*"). In any event the judge failed to appreciate that had these proceedings been compelled to proceed as private law claims then the nature of the proceedings, including the remedies available, might have been very different.

145. Fifthly, the judge erred in finding at [101] that there would be no prejudice. He should have concluded that the attempt to unravel the relevant scheme would cause damage to good public administration: see eg *Delve* (ibid) at [129].

146. The respondents disagree. Their submissions can be summarised as follows.

147. First, it is said that the judge should have applied the "*Denton*" test. However, before the judge this was not the approach taken by the Secretary of State, who argued that the test was whether there was a "*good reason*" to extend time. In reality there was no practical difference between the approach applied by the judge and the *Denton* test. In substance the judge did consider all of the components of the *Denton* test. In relation to due formalities the judge found that there was non-compliance which he categorised as "*regrettable*". The suggestion that the judge failed to consider the implications for the administration of justice of allowing public law claims so long out of time is wrong. The judge expressly recognised the importance of compliance with time limits in public law cases [97]. It follows that he did not fail to address whether there was non-compliance or its consequences. But the nub of his analysis can be described as a *Denton* limb 3 evaluation. Under the third limb once it has been found that there were failings in terms of formalities and evidence a judge is still required to consider the circumstances in the round; this the judge did. The law makes clear that the mere fact of procedural failings is not, in and of itself, sufficient to warrant the setting aside of the proceedings: see eg *Mitchell v News Group Newspapers* [2013] EWCA (Civ) 1537; [2014] 1 WLR 795. Standing back there is no basis upon which it can be said that the judge erred or that even if he did that it was in any way material. This being so the application for permission to appeal must fail at this first hurdle. Secondly, the decision of the judge to grant an extension was an exercise of discretion. It was essentially a case management decision. On appeal the Court should be slow to interfere: see eg *R (Thornton) Hall Hotel Ltd) v Wirrall* MBC [2019 EWCA Civ 737 paragraph [21(8)]. For the Court to intervene there has to be misdirection in law, a failure to have regard to a relevant consideration, or the taking into account of some irrelevant matter. The judge's conclusions had to be "*clearly wrong*", and the Court will not interfere so simply because it might have taken a different position to that of the judge.

148. Thirdly, in any event, the reasons given by the judge for justifying the extension were compelling. He treated the case as public interest litigation of wide importance which is an indisputable conclusion. The judge also recognised that it was open to him to order that the present case could have been directed, under CPR 8, to continue as a private

law claim subject to entirely different and much longer limitation periods (six years). Further, much the same would apply to third parties who equally could enforce their rights as private law claim subject to the six-year limitation period.

149. Fourthly, the judge made a sensible case management decision. He was faced with a hearing to determine questions which all parties recognised as of wide public importance. In these proceedings all relevant parties were present, including the Secretary of State, the PPF and scheme members. This enabled the judge to hear argument and receive evidence from all affected interests. It would have been a waste of time and judicial resources if at the end of a five-day hearing the judge had simply held that all the claims failed for being out of time. The consequence would have been a flurry of subsequent, piecemeal, individual, claims where wider interests could not readily be assessed, where the Court would have been denied the full range of submissions, and where there could have arisen a series of new procedural issues which could have deflected the case far from its true pith and substance.

(iii) Conclusions

150. We turn to our conclusion. We take the view that this Ground is not arguable. We refuse permission to appeal. This is for the following reasons.

151. First, we can detect no error of law. The Secretary of State criticises the judge for not applying *Denton* but did not invite him to apply that approach at first instance. The "*good reason*" approach followed by the judge was the test set out in written submissions by the Secretary of State. In fact the judge interpreted the "*good reason*" test as requiring him to determine what was "*appropriate and just*" [97]. It is, in our view, unsatisfactory for the Secretary of State to invite this Court to go hunting for reasons to overturn a judge who applied the test advanced by the Minister at first instance. But in any event, it is not in our view correct to say that had *Denton* been applied more mechanistically the judge would have arrived at a different conclusion. As the Respondents point out, in substance, the judge did address (albeit briefly) the nature, extent and consequences of the procedural fallings (*Denton* limbs 1 and 2); but was persuaded to permit the claims to proceed by the broader public interest nature of the issues (*Denton* limb 3). When we focus on substance and not form, we can see no error in the approach adopted. In substance the judge did not err. This being so the decision was an exercise of discretion by a first instance judge in a public law case as a matter of case management. We should be very slow to interfere. In our judgment this ground must fail for this reason alone.

152. Secondly, if, contrary to our clear view, the judge did apply the wrong test, and it therefore fell to us to consider the exercise of discretion afresh, we would have exercised the discretion in the same way, and for essentially the reasons which the judge gave. The reasons given by the judge for extending time were sound. He set these out at [98] – [100]. They can be summarised as follows: (i) the rights in the present case sound in both public and private law; (ii) because these rights sound in private law, longer limitation periods apply; (iii) it can be necessary even in private law proceedings to consider public law issues; (iv) in the present case the 24 individual claimants could have brought private law proceedings for claims going back 6 years; (v) these (directly effective) private law claims could have raised the issue of the lawfulness of the cap under EU law; (vi) the Administrative Court could have ordered (under CPR 54.20) that the claims in relation to this particular challenge (to the cap) continue as if started

as a private law claim under CPR 8; (vii) this was a "*powerful factor*" indicating that it would be right to extend time to allow this judicial review claim to be brought; (viii) furthermore, the claim raised issues of general importance which were likely to arise in future cases in any event. In short it was better to resolve those issue now rather than leaving them as live but unresolved.

153. Thirdly, our conclusion is fortified by the fact that this being an appeal much water has now passed under the bridge. The present case is a good illustration of why this Court should be very wary of interfering. We questioned counsel for the Secretary of State about the consequences for this appeal if his arguments were correct. If the Court had agreed with the Secretary of State, we would, on this analysis, allow the appeal on a technical ground leaving extant all of the judge's detailed reasoning on the important substantive issues arising. This would risk legal uncertainty since the Court would not have rejected that reasoning; if we had set aside the judgment below on a purely technical ground it would not have been open to us to say that the reasoning was wrong in law - we would not have formed that conclusion. Yet again, if we had concluded that the judge erred in relation to timing but had then proceeded to address and decide all the legal issues then the argument of the Secretary of State about timing would have been academic. In the event this Court has addressed the legal arguments arising and we were not invited to address timing as a preliminary issue and then bring the appeal to halt if we were with the Secretary of State.

154. We make the following additional observations.

155. The starting point is that this is a public law case where the Claimants have concurrent public and private law rights. This flows from the fact that the Court of Justice had held that the rights under Article 8 of the Directive are directly effective which, accordingly to well established law, means that affected persons have rights which the national courts were bound to protect by according full and effective remedies. The present case was hence not simply the province of judicial review but also engaged private law rights. In so concluding the judge was clearly correct.

156. Next, it follows that these claimants, and any others equally affected, could have pursued claims for compensation invoking their directly effective rights outside of judicial review in private law proceedings. On even the most restrictive view of when time started to run all these claimants would have been in time.

157. Further, in adjudicating upon these directly effective claims the duty of the High Court is to guarantee an effective remedy. As the judge observed, the High Court in private law proceedings could not have objected that it had no power to determine public law issues arising as part of those claims. It is not uncommon for public law issues to arise in private claims and vice versa, and for courts today to seek to find a solution which is most conducive to justice rather than standing rigidly upon form: see eg the commentary in Fordham, Judicial Review Handbook (2020) pages [410ff]. It needs to be remembered that when parties argue as to whether a *lis* should be resolved in public or private law proceedings it will be a High Court judge hearing the dispute regardless. Often the argument will narrow to a dispute as to whether the case should be heard as a private claim in the Queen's Bench Division or as a public law claim in the Administrative Court also therefore in the Queen's Bench Division, quite possibly with the same judge.

158. In such circumstances the decision of the judge was a classic case management decision. From the outset this case had been set up as a test case. The claimants had issued private law proceedings upon a protective basis and had sought case management directions so that the case could proceed as a test case on public law grounds. The Secretary of State in written submissions to the judge had recognised that important issues of public concern were raised. It was for this reason that the PPF sought to ensure that all affected scheme members were served as potential interested parties. Further, before the judge the PPF did not contend that the challenge to the method of implementing the judgment in *Hampshire* was out of time. The challenge to this aspect of the case was filed within 3 months of date of the Decision (5th November 2019). Had the judge agreed with the timing objection then the effect would have been that on clearly related issues (the cap and implementation) he would have severed the challenges and continued with the challenges to the implementation of the *Hampshire* judgment. This fracturing of such related issues could hardly have been conducive to good administration. Finally, all the issues were essentially of law; it is not said that there were issues that could not be adequately addressed in the context of a judicial review. In our view the judge's conclusion that the case was appropriately continued as a judicial review was a decision he was entitled to reach. We do not find that the judgment in *Eurotunnel (ibid),* relied upon by the Secretary of State, assists and we do not follow it.

159. Lastly, we address the argument that the judge erred when he concluded at [101] that there was no prejudice to the Secretary of State in the case continuing as a judicial review. The Secretary of State argues that the litigation was an attempt to "*unravel*" a legislative scheme, and this would cause damage to good public administration. We disagree. The Court of Justice laid down the law in its judgment in *Hampshire*. The Government and the PPF were bound to implement such changes to the scheme as were necessary to bring the scheme into compliance. To object that it amounts to prejudice to have to unravel the scheme is tantamount to saying that it is contrary to good administration for the State to have to comply with the law. The use of the phrase "*unravel*" adds nothing. In any event upon the basis that the judge is correct and the same issue could have been raised in private law proceedings then any prejudice that might arise would, on the analysis of the Secretary of State, simply have been deferred until later proceedings, not avoided. In our view the judge was entitled to make this finding.

160. For all these reasons we refuse permission to appeal on this ground.

Ground II: scope / implementation

(i) The issue

161. Ground II concerns the argument of the Secretary of State that the decision which is under challenge does not engage EU law. As such it cannot be challenged under the Charter or by reference to general principles of EU law. It is subject to domestic law only.

162. The implications of this challenge were fairly explained to us by Mr Coppel QC, for the Secretary of State. It is accepted that if this analysis is correct then the question of the lawfulness of the cap would still be subject to the Human Rights Act 1998 ("the HRA"). He also accepted that, as between EU law and the HRA, in practical terms

there would be no significant daylight. In other words, the analysis would not materially differ. The difference between the two sets of principles would however lie in the relief that the Court would grant if it found that the cap was unlawful under the HRA 1998, but not EU law. Under EU law the Court must disapply the Scheme to the extent that it is inconsistent with EU law and this would involve remedial action by both the PPF and Parliament. However, if the cap were held to be unlawful under the HRA only then all that the Court could do would be to make a declaration of incompatibility. This would give to the Government and to Parliament a wider scope and latitude to address remedial action including as to its timing and its nature, including the possibility of not taking steps of implementation.

163. The Secretary of State argues that the decision does not engage EU law because the Directive as construed by the Court of Justice in *Hampshire* has made clear that it is a measure of minimum harmonisation ie it lays down a floor level of protection below which Member States may not drop, but it leaves to national law any protection that sits over and beyond the floor, which therefore includes the *modus operandi* of the cap.

(ii) The Judge's reasoning

164. The judge did not accept this analysis. The nub of his reasoning is set out at [109]. In short, he concluded that, properly interpreted, Article 8 imposed a broad duty upon Member States to protect the interests of employees. It was not, as drafted, a provision purely and simply of minimum protection. The judgment of the Court of Justice in *Hampshire* did not set out to redraft Article 8 or limit its cope. In that case, and within the broader scope of Article 8, the Court of Justice defined what was directly effective and conferred rights upon individuals. The Court of Justice did this by reference to a level of protection which Member States could not drop below. The Court of Justice did not, however, go further and allocate exclusively to national law everything above that floor level, which hence remained within the realm of EU law. Accordingly, when Member States adopted measures over and above the floor, they were still implementing EU law. The judge stated:

> "109. The central question is whether the United Kingdom was implementing EU law when it enacted the provisions imposing the compensation cap. In my judgment, it was. First, Article 8 of the Directive provides that member states shall ensure that the necessary measures are taken "to protect the interests of" employees and those who have left employment "in respect of rights conferring on them immediate or prospective entitlement to old-age benefits including survivors benefits". The Court of Justice has recognised that member states have a considerable latitude in deciding the means and levels of protection and, having due regard to proportionality, may reduce the accrued entitlement in the event of an employer's insolvency. Article 8 of the Directive requires member states to guarantee "each individual employee, without exception, compensation corresponding to at least 50% of the value of their accrued entitlement" (see the Court of Justice in *Hampshire* [2019] ICR 327 at [41]-[42] and [50]). In *Bauer* the Court of Justice recognised that a reduction in benefits may still be manifestly disproportionate where it left the person at risk of poverty even

> if the pensioner received more than 50% of the value of accrued benefits. Article 8 is not limited to providing 50% of the value of such benefits and protecting from the risk of poverty. Those are ways in which the obligation imposed by Article 8 of the Directive to take the necessary measures to protect pension rights is achieved. If a member state adopts other measures to protect pensions in the event of insolvency, it would still be implementing the obligation in EU law to take the necessary measures to protect pension rights. If a member state took further measures but provided for different levels of protection on grounds of nationality, or place of residence, or sex, or age, that would fall within the scope of the implementation of EU law. It would not, as Mr Coppel submitted, be nothing to do with EU law and would not simply be a matter of choice for a member state subject to its own rules."

165. We agree with this analysis. Before examining the relevant authorities, it is necessary to start from first principles and consider the legislative structure.

(iii) The legislative framework

166. The legal basis of the Directive is Article 137EC (now Article 153TFEU) entitled "*Social policy, education, vocational training and youth*". Any measure adopted under Article 137 has to be "*with a view to achieving the objectives in Article 136"* (now Article 152 TFEU) which requires both the Community and the Member States to have in mind "*fundamental social rights*":

> "Article 136
>
> The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.
>
> To this end the Community and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.
>
> They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of

> provisions laid down by law, regulation or administrative action."

167. Article 137 requires the Community to "*support and complement the activities of the Member States"* in the defined fields, which includes social and employment policies. Article 137(1) thus provides:

> "Article 137
>
> 1. With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:
>
> (a) improvement in particular of the working environment to protect workers' health and safety;
>
> (b) working conditions;
>
> (c) social security and social protection of workers;
>
> (d) protection of workers where their employment contract is terminated;
>
> (e) the information and consultation of workers;
>
> (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
>
> (g) conditions of employment for third-country nationals legally residing in Community territory;
>
> (h) the integration of persons excluded from the labour market, without prejudice to Article 150;
>
> (i) equality between men and women with regard to labour market opportunities and treatment at work;
>
> (j) the combating of social exclusion;
>
> (k) the modernisation of social protection systems without prejudice to point (c)."

168. In the implementation of Article 137(1) the Council is empowered to adopt a variety of measures. These include, under Article 137(2)(b), directives laying down measures of minimum requirements:

> "2. To this end, the Council:
>
> (a) …

> (b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings."

169. A series of caveats or limitations are set out in Article 137(4) and (5):

> "4. The provisions adopted pursuant to article:
>
> - shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,
>
> - shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty.
>
> 5. The provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs."

170. Four points of relevance can be extracted from the structure of the Directive, and, in particular, its recitals, which shed light upon the policy underlying the Directive and which therefore guide the proper interpretation of its substantive terms, including Article 8. No one suggests that, properly construed, the Directive is exclusively concerned with laying down a minimum level of protection of pension rights.

171. First, the Directive is, as its formal title makes clear, concerned with "*the protection of employees in the event of the insolvency of their employer*"; its scope is therefore broader than just providing for employee pension protection upon insolvency, albeit that this will be an important component of that broader subject matter. Secondly, nothing in the recitals refers to the Directive as a measure designed to do no more than define a minimum level of pension protection upon insolvency. For example recital 3 refers to it being necessary "… *to provide for the protection of employees in the event of the insolvency of their employer and to ensure a minimum degree of protection in particular in order to guarantee payment of their outstanding claims*…". The use of the conjunctive "*and*" supports the conclusion that the setting down of minimum levels of protection is but one part of the broader protective function of the Directive. Thirdly, the Directive confers a power on Member States to set limits on the "*responsibility of guarantee institutions*", ie Member States, when implementing EU law, can offer guarantees less than 100% of the rights otherwise due (recital 7). Those limitations nonetheless "*must be compatible with the social objective of the Directive*" and recital 2 emphasises the importance of fundamental rights. The language used is not redolent of the conferring upon Member States of a power to limit protection which circumvents fundamental rights. Fourthly, recital 9 explains that the achievement of these objectives cannot be attained by Member States acting alone and that in accordance with the principle of subsidiarity and proportionality this justifies action by the Council at the EU level.

172. Our conclusion drawn from the recitals is further borne out by the substantive provisions of the Directive. Article 1 is headed "*Scope and Definitions*". It is important because it defines the ambit of the instrument and is therefore central to understanding whether it is drafted so as to define a minimum set of guarantees only, or whether it goes further. As will be seen it is not drafted in terms of setting minimum rights. To foreshadow a point made later, this is relevant because in other measures under Article 137 (such as the working time directive – analysed below) the scope of the instrument is explicitly defined in terms of the setting of minimum rights. Article 1(1) explains that the scope of the Directive concerns "*employees' claims*", a subject matter of relatively broad scope. It provides:

> "Article 1
>
> 1. This Directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1)."

173. Article 1(2) and (3) sets out certain exceptions from the scope of the Directive; none apply to the facts of the present case.

174. Article 4, and as envisaged in the recitals, provides that Member States are permitted to exercise an "*option*" to limit the liability of the guarantee institution but in accordance with limits and minima set by the Directive and these can entail "*ceilings*" for recovery which must however be consistent with the "*social objective*" of the Directive. Where Member States exercise this option, they must inform the Commission (which supervises compliance with the Directive). The Article is set out in full at [18] above.

175. Article 8, the provision in dispute in these appeals, is in the Chapter entitled "*Provisions concerning social security*". It is not drafted in terms of the setting of minimum rights. It is helpful to set it out again here:

> "Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes."

176. Finally, we would mention Article 11, under the heading "General and Final Provisions". This refers to the "option" for Member States to introduce laws which are more favourable, but it also curbs that freedom by the introduction of a non-regression obligation which serves to circumscribe "implementation" of the Directive. It provides:

> "This Directive shall not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.

> Implementation of this Directive shall not under any circumstances be sufficient grounds for a regression in relation to the current situation in the Member States and in relation to the general level of protection of employees in the area covered by it."

177. Standing back, the Directive is based upon treaty provisions which contemplate shared and complementary jurisdiction as between the EU and the Member States and which require both to adhere to fundamental rights. The legal scope of the Directive as defined in Article 1 is broad and is not limited to the setting of minimum standards. Equally, Article 8, the provision in issue, is crafted in broad terms embracing subject matters extending beyond pension rights and, in so far as it permits minimum rights, these are hedged around and are strictly controlled by the terms of the Directive.

178. Before considering the case law our provisional conclusion is that, as drafted, Article 8 covers more than pension rights and that action by Member States in that area of social rights involves Member States acting within the scope of EU law. As such when they do so they are implementing EU law and must adhere to established principles which, at the relevant time, included the Charter.

(iv) The case law

179. Does the case law indicate or compel a different conclusion? Mr Coppel QC, for the Secretary of State, submits that it does. Three principal authorities are cited. The parties devoted considerable effort before us to analysing these authorities. It is necessary to consider them carefully.

180. The first is Joined Cases C-609/17 and C-610/17 *TSN v Hyvinvointialan liitto ry*, (19th November 2019) ("*TSN*"). This concerned Directive 2003/88/EC of the European Parliament and of the Council of 4th November 2003 "*concerning certain aspects of the organisation of working time*", commonly referred to as the working time directive ("the WTD"). In a nutshell the Court of Justice held that action by Finland in this field which went beyond the minimum rights stipulated in the WTD was a matter of national law outwith the scope of EU law and therefore to which the Charter did not apply. It was argued before us on behalf of the Secretary of State that by parity of reasoning the same applies to the decision now in dispute, which creates a scheme affording protection over and above the minimum level of rights identified by the CJEU in *Hampshire* and which therefore, it is said, sounds in domestic law only.

181. To understand the judgment it is important to set out the relevant provisions of the WTD. Article 1 is entitled "*Purpose and scope*". It is explicitly drafted to set minimum standards only (in contrast therefore with Article 1 of the Directive). It provides:

> "'1. This Directive lays down minimum safety and health requirements for the organisation of working time."
>
> 2. This Directive applies to:
>
> (a) minimum periods of … annual leave …"

182. Article 7 sets out a minimum level of four weeks paid annual leave:

> "1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice."
>
> 2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."

183. Article 15, entitled "*More favourable provisions",* provides:

> "This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers."

184. The first question posed by the referring court asked in essence whether Article 7(1) was to be interpreted as precluding national rules or collective agreements which provided for the granting of days of paid annual leave which exceeded the minimum period of 4 weeks, but which excluded the carrying over of those days of leave on the grounds of illness. The Court of Justice held in paragraphs 33-35 that such measures were for national law to govern, not EU law. The Court of Justice arrived at this conclusion by interpreting the Directive to determine its scope. The Court of Justice emphasised the limited nature of the scope and purpose in Articles 1 and 2 in laying down minimum rights:

> "34. Indeed, it is expressly apparent from the wording of Article 1(1) and (2)(a), Article 7(1) and Article 15 of Directive 2003/88 that the purpose of that directive is simply to lay down minimum safety and health requirements for the organisation of working time and it does not affect the Member States' right to apply provisions of national law that are more favourable to the protection of workers…"

185. The phrase "*simply*" is important. The Court of Justice treated as important the fact that the scope of the WTD as drafted was "*simply*" to determine minimum rights, and therefore nothing more.

186. The third question posed concerned the application of the Charter to the national rules in question. To answer this question the Court of Justice also had to determine whether the national rules in question were "*implementing*" EU law or, alternatively, were domestic law initiatives only. The Court of Justice held that the "*mere fact*" that a domestic measure might sit in an area in which the EU had powers was not sufficient to bring it within EU law (paragraph 45). What mattered was the scope and purpose of the directive. And as to this, in similar vein to its answer to the first question, the Court of Justice placed weight on the fact that the WTD was intended "…*simply to lay down minimum safety and health requirements for the organisation of working time*…". It

followed that Member States remained free above the minimum level of protection to adopt national measures which were not therefore to be treated as implementations of EU law otherwise engaging the Charter.

187. As for Article 15, pursuant to which the WTD "*shall not affect*" Member States' "*right*" to apply provisions of national legislation that were more favourable, the Court of Justice held ([48]) that it "*merely recognises the power which they have to provide for such more favourable provisions in national law, outside the framework of the regime established by that directive*". The "*power*" of Member States was thus governed by the "*framework*" laid down by the Directive which, in turn, was governed by the scope and power provisions in Article 1. Article 15 did not create new national law rights; it simply recognised and reflected the delineation of powers already set out.

188. At [50] the Court of Justice distinguished between two different situations:

> "50. Therefore, the situations at issue in the main proceedings are different from the situation in which an act of the Union gives the Member States the freedom to choose between various methods of implementation or grants them a margin of discretion which is an integral part of the regime established by that act, and from the situation in which such an act authorises the adoption, by the Member States, of specific measures intended to contribute to the achievement of the objective of that act…"

189. This judgment clearly points the way. The scope and purpose of the Directive in issue in this appeal is broader than the deliberately narrow scope of the WTD. Yet it was that narrow scope that was pivotal to the judgment in *TSN*. The judgment in that case, in our view, is strong confirmation of the correctness of the conclusion of the judge below.

190. The next case relied upon is Case C-198/13 *Víctor Manuel Julian Hernández v Reino de España* (10th July 2014) ("*Hernandez*"). The judge was not referred to this case. This concerned not only Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer (the directive in issue in these proceedings) but also its relationship with the Charter. The question was whether Article 57(1) of the Workers' Statute (the national law in issue) amounted to the implementation of EU law thereby engaging the Charter. Article 57 provided:

> "Where the judgment declaring the dismissal to be unfair is delivered more than 60 working days after the date on which the action for unfair dismissal was brought, the employer may claim from the State payment of the economic benefit which the worker receives in accordance with Article 56(1)(b) for the period beyond those 60 days."

191. At [37] the Court of Justice identified certain (non-exhaustive) factors relevant to answering the question:

> "In accordance with the Court's settled case-law, in order to determine whether a national measure involves the implementation of EU law for the purposes of Article 51(1) of the Charter, it is necessary to determine, inter alia, whether that

> national legislation is intended to implement a provision of EU law; the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or rules which are capable of affecting it …"

The Court of Justice held [41] that EU law did not apply and that the measure was not therefore an implementation the Directive. The short reason for this was because the measure was enacted for a completely different purpose to that in the Directive, namely, to protect employers from delays and inefficiencies in the judicial system. It was not a measure intended for the protection of employees.

192. Applying these indicia to the present case the analysis we have set out above addresses whether the cap is intended to implement EU law. This entails an exercise in legislative construction and, as set out above, we conclude that it is. As to the nature and purpose of the Directive, it is designed to protect employees (not employers) and is part of a package of measures implementing the *Hampshire* judgment. Mr de la Mare QC for the third to fifth Respondents argued that whereas the employer protection scheme in *Hernandez* was severable in all respects from the parallel scheme in the Netherlands affording employee pension protection, the present scheme was not severable - the parts the Secretary of State said were subject to national law were integrally connected to the parts which were unquestionably an implementation of EU law. They were in substance one and the same scheme. We see the force in this.

193. In our judgment both *TNS* and *Hernandez* support the conclusion of the judge.

194. The third judgment is that of the Supreme Court in *Sanneh v Secretary of State for Works and Pensions* [2017] UKSC 73; [2019] AC 854. This concerned the rights of so-called "*Zambrano carers*" and their children to financial support from the state. The rights in dispute flowed from the judgment of the Court of Justice in (Case C-34/09) *Ruiz Zambrano v Office national de l'emploi*. ("*Zambrano*"). The case concerned a Colombian national living and working in Belgium with her children, and paying social security contributions, but without a right to reside. Her three children acquired Belgian nationality at birth, and with that nationality, European citizenship and the right of free movement. In 2005 Mrs Zambrano lost her job and was refused unemployment benefit because under national law that was conditional upon her having a right to reside. The CJEU held that the refusal of such a right was unlawful because it resulted in the children being deprived of the effective enjoyment of their rights as European citizens. The issue of relevance to the present appeal concerns the argument advanced before the Supreme Court that certain domestic measures in the field designed to ensure adherence to the *Zambrano* judgment were in breach of the principle of non-discrimination under the Charter. The question for the Supreme Court was whether these national measures had a connection with EU law sufficient to engage the Charter.

195. It was argued for the claimant that the measures were an implementation of EU law because the claimant was personally within the scope of EU law "*ratione personae*" (adopting the language of the Court of Justice in *Martínez Sala v Freistaat Bayern* (Case C-85/96), [1998] ECR I-2691). Mr Coppel, who appeared in that case for the Secretary of State, argued that it was insufficient for the claimant to be personally ("*ratione personae*") within the scope of the Treaty by virtue of her derivative right of

residence. Nor was it enough that the national law was related "*in some way*" to EU law. There had to be a direct link between the act in question and implementation of that law. Lord Carnwath, for the unanimous Court, agreed. He stated:

> "28. In my view Mr Coppel's approach is correct. The test is not whether Mrs HC is personally within the scope of EU law in some way. The issue must be judged by reference to the test set by article 51, which is directed to "implementation" of EU law. Once it is determined that EU law does not require more for the children of a Zambrano carer than practical support sufficient to avoid their being obliged to leave the Union, that also sets the limits of what is involved in its implementation. Although it is open to the state to provide more generous support ("gold-plating", as it is sometimes called), that is the exercise of a choice under national law, not EU law. To describe this as "regulating" the financial assistance given to the EU carer does not alter that fact. Just as Mr Ymeraga could not rely on the Charter to extend the derivative rights otherwise available to his family members, so Mrs HC cannot rely on it to give her any entitlement to financial assistance beyond the limited support required by the Zambrano principle itself."

196. In our view this does not materially assist. It describes a test which is not inconsistent with the guidance given in *TSN* and in *Hernandez,* but which is considerably less detailed in its analysis and, as the judge below held, involves factual circumstances which were very different from those in issue in this appeal. The conclusion in that case cannot therefore readily be transposed to the present case, which turns upon a detailed analysis of the scope and purpose of the Directive. However, if and in so far as it is relevant, when we apply the broad test set out in that judgment to the present facts we would still arrive at the same conclusion as did the judge.

197. The final point we should address is Mr Coppel's argument that the definitive interpretation of Article 8 has to be that in *Hampshire* where the Court of Justice had made clear that, properly interpreted, Article 8 amounts to a set of minimum requirements. However persuasive we might consider to be the judge's reasoning on the language of the Directive, the Court of Justice had now spoken, and this Court was, in effect, bound by its limited construction of Article 8.

198. In our judgment all the Court of Justice was doing in *Hampshire* was making clear that within the broader confines of the Directive generally and Article 8 more specifically there is a minimum set of rights that could not be placed in jeopardy by national law. The Court was not deciding that the 50% threshold amounted to full and exhaustive satisfaction of Article 8.

(v) Conclusion

199. For all these reasons we are clear that the judge was correct. The creation of the cap was an implementation of EU law. We consider this to be sufficiently clear to refuse permission to appeal.

Ground 3: *Age discrimination*

200. We will now consider the appeal against the judge's decision that the cap is contrary to EU law because it results in discrimination on the grounds of age which is not justified. This part of the judgment is in four main sections:

i) the background to the judge's decision

ii) the judge's reasoning on the discrimination claim

iii) the submissions on this appeal and

iv) our conclusions.

The background to the judge's decision

201. In this section of the judgment, we summarise the material in the judgment which, we consider, is the relevant background to the judge's reasoning on discrimination. We have divided it into five sections.

i) In paragraphs 62-72, he summarised the policy background to the adoption of the cap. Between paragraphs 74-76, he set out the conclusions which he drew from the policy material.

ii) In paragraph 73, he described the cap as originally enacted. In paragraphs 77-78, he described the concerns which led to, and the enactment of, prospective amendments to Schedule 7 in 2014. Those amendments did not take effect until 2017. We will refer to them, therefore, as "the 2017 amendments".

iii) In paragraph 79, he described the numerical effect of the cap and the cost of removing it.

iv) In paragraphs 28-45, he compared the effect of the cap on the compensation paid by the PPF with the pensions to which the claimants would have been entitled if their employer had not become insolvent.

v) In paragraphs 49-61, he described the PPF's response to the decision of the Court of Justice in Hampshire.

We will now consider those sections in a little more detail, but no more than is necessary to set the scene.

The policy background to the cap

The judge's summary of the policy materials (paragraphs 63-72)

202. The judge noted that the Secretary of State gave six reasons for the cap. The thinking behind it was described in two witness statements, and emerged from contemporaneous documents. The initial plan was to apply the cap to everyone, whether they were above, or below, NPA.

203. A policy note in November 2003 showed that the current scheme was being considered then. The 'step' at NPA was justified to combat 'moral hazard', to protect the incomes of pensioners and to do so in a way which was not too complicated, or which contradicted the overall objectives. The 90% limit and the cap were both designed to combat 'moral hazard'. If the PPF gave full protection, company decision-makers and trustees would be less concerned to ensure that schemes were properly funded, as members would get the pensions they were expecting whether or not the scheme was properly funded. Both measures would affect the actions of those with influence, who would care about the effect of losses on other employees and members. The cap was said to have "a crucial additional impact" as it would "bite on relatively high earners many of whom will be in a position of influence within the company". The extra losses they would incur because of the cap would make them more likely to exert influence to ensure that the scheme was properly funded. It was not appropriate to apply the cap to those who had reached NPA as they had less opportunity to make up any shortfall and would have adjusted to a certain level of pension in retirement. It was fairer to treat all those below retirement age in the same way, even those who had retired before their NPA. Alternatives were considered, including removing the cap. The Department thought that the cap was important in combatting "moral hazard" because of its indirect effect on influential people.

204. The judge then considered a policy note dated May 2004. This dealt with the justification under the ECHR for treating people above and below NPA differently. It considered arguments in favour of full protection, and those against. The most important contrary argument was "moral hazard". Officials wanted employers, decision-makers and trustees to ensure that schemes were properly funded. They would tend to take less care to ensure that if they believed that the PPF would "at no significant cost to them or their company" provide full protection for (i) their own pensions "if they are in the scheme" (this applied to employers, directors, others in a position of influence in the company and trustees who were scheme members) and for (ii) the pensions of other scheme members, because the decision-makers "will care about their employees' contentedness and hence productivity; their personal reputations; the fact that they would have to justify their decisions under difficult circumstances in the future (eg pensioners tying themselves to railings outside their homes); the pensions of people they know personally, and, because, on the whole, they will be caring people, the pensions of existing and past employees more generally".

205. The concerns described in (i) in the previous paragraph were much more likely to focus on the treatment of members under NPA, whereas those described in (ii) would focus on those members, but less. The note referred to experience in United States of America, and to responses to the consultation which strongly suggested that strong steps to combat "moral hazard" were needed. A further important argument against full protection was its cost. The note described the ways in which "moral hazard" could be countered. The most obvious was to provide less than full protection, which would also control costs. The protection could either be less than 100% of the benefits promised, whatever their level, or the benefits could be capped in some way so that "those with high salaries and/or benefits would receive less than full protection. This is particularly (but not solely relevant) …(i) because company decision-makers are more likely to have high salaries and benefits. It is therefore also particularly relevant for people below NPA".

206. The note considered and rejected the option of limiting the protection offered to company decision-makers. A general cap was thought to protect against "moral hazard" more widely and that something targeted at directors would be a blunt instrument. It would unfairly harm those who tried to do the right thing and those who, in practice, had no influence, while failing to catch some of those with influence. It attributed such very great importance to combatting "moral hazard" that people still some distance from NPA should not receive full protection. Both the 90% limit and the cap were significant tools. It gave reasons why those above NPA should not suffer a loss of income. Potential anomalies were recognised and alternatives were considered.

207. The third document which the judge considered was a policy paper on justification and the HRA, which sought advice from the Law Officers. This document explained that the policy sought to balance the aims of ensuring that employees received compensation as close as possible to the pensions they were expecting, minimising costs to employers so that they would continue to provide occupational pensions, and limiting the potential for abuse and "unwanted behavioural consequences (moral hazard)". It noted employers' concerns about the cost of the PPF. It defined "moral hazard" as the risk that those who could influence the running of a pension scheme would take less care than they would do otherwise because of the existence of the PPF. It considered ways of dealing with this, including a risk-related levy and powers to deal with deliberate manipulation.

208. Paragraph 16 of the policy paper said that the provision of less than full protection was a "standard weapon used in insurance/compensation schemes to address moral hazard". The Department considered that it was necessary to provide less than full protection to "a major proportion of scheme members" by limiting their compensation to 90% and by capping benefits. This would balance protection and costs. The Department's belief was that "the imposition of the cap will mean incentives to manipulate or take less care will be significantly diminished". This approach provided essential incentives for everyone, including scheme members, to ensure that their scheme was well funded.

209. In paragraph 70 of the judgment, the judge described the reasoning in the policy paper in support of the percentage limit and the cap. They were said to address "moral hazard" in different ways. Those included, in group (i), the direct impact on the potential incomes of decision-makers, because, if their schemes were transferred to the PPF, they would receive a smaller pension than they would have expected. There was also an indirect effect on decision-makers because they would be concerned about the impact on others if the scheme was underfunded. Those others were in group (ii). Group (ii) was said to include (a) key influencers, (b) employees (who would see if their pension scheme was not being well funded; if they became unhappy this could affect productivity and profits) and (c) deferred members, and pensioners. In paragraph 24 the policy paper said that the proposed cap was designed "in particular" to affect those "in positions of power or influence, both at director …and at a senior manager …level".

210. The policy paper also said it was necessary to control costs. It analysed the implications of the proposed cap, including its anomalies, which included that those above NPA would not be subject to the 90% limit, or to the cap. It compared those who had retired early with those who had not. It also considered alternatives.

211. The last document which the judge considered was extracts from discussions about the Pensions Bill in a standing committee of the House of Commons. The Pensions

Minister said that "moral hazard" was important. Those who could influence the way in which a scheme was run might take less care than they would otherwise if they knew that the PPF would give complete protection. The focus of the discussion, the judge said, was the 90% limit, not the cap.

The judge's conclusions about the policy materials (paragraphs 74-76)

212. The judge's summary of the materials was that they showed two concerns. The first was to combat "moral hazard", which he described as "the risk that those with influence over …the pension scheme…would take less care to ensure that pension scheme was properly funded if members would receive 100% of the value of their benefits from the [PPF] in the event of insolvency". The second was the concern of employers about the cost of the PPF, which might deter them from providing pensions. Combatting "moral hazard" was not seen as being limited to capping the pensions of decision-makers or those in a position of influence. "The view was that those persons would be affected by limits on their own pensions, and in particular, by the benefits payable to other members of the scheme". For various reasons, the decision-makers would be influenced by losses imposed on their colleagues and on other employees. That was achieved by imposing a limit of 90% on the compensation due to all members below NPA, and a cap on relatively high earners.

213. He said that the 90% limit was the focus of much of the discussion. That limit was not challenged in the proceedings. He acknowledged that the cap was also referred to. It was appreciated (see the May 2004 note) that that the cap would affect scheme members generally, and not just decision-makers and those in a position of influence. That note expressed concern about limiting protection for directors who had tried to do the right thing, and those employees who had no practical influence. Officials considered whether to apply the 90% limit and the cap to people who had reached NPA and decided not to. They also decided that the cap and the 90% limit should apply to those who were below NPA but who had already retired. The documents showed that nobody thought, before the enactment of the Act, about the effect of the cap on those employees who might be subject to the cap because of their long service.

The cap as originally enacted (paragraph 73) and the 2017 amendments (paragraphs 77-78)

214. On enactment, the Act included the 90% limit on compensation and the cap. At that stage, the cap was over £27,700, which was higher than median annual earnings, and more than twice the mean annual pensioner income. The cap is increased every year in line with wage inflation. There was some reference in the documents to an indication by a Minister that only 2% of those below NPA would be affected (judgment, paragraph 73).

215. The judge referred to a debate in Parliament in December 2012 in which the Minister of State for Work and Pensions expressed his concern (which had increased over a period of two and a half years) that the cap "acts in a penal way and not on those it was intended to affect". The Minister referred to those people as "fat cats". There might be an issue of "moral hazard" in relation to them. The people whom it was not intended to affect were longer-serving employees who had worked all their lives for one employer and who had "made their financial plans on the basis of the pension and have nowhere to top it up".

216. In 2014, Parliament amended Schedule 7 to the Act. The amendments did not come into force until 2017, and were prospective only. They provided for an increase in the amount of the cap for members who had more than 20 years' pensionable service. The judge said of the amendment, "Read in isolation, that appears to be a recognition that the effects of the cap ought to be mitigated to some extent for one group of pensioners, namely those with long service" (judgment, paragraph 78).

The numbers affected by the cap and the costs of removing it (paragraph 79)

217. In paragraph 79, the judge summarised the evidence of Mr Taylor (of the PPF) about the numbers of people affected by the cap. By March 2019, the PPF had assumed responsibility for compensating over 284,000 members of 974 schemes. Just over 140,000 people were members of schemes which were in assessment. When the 2017 amendments came into force, 550 members were subject to the cap. 355 of those benefitted from the long-service provisions. A further 62 people who were subject to the cap and who retired in the two years before April 2019 also benefitted. The PPF's overall view was that the proportion of members who would receive compensation from the PPF subject to the cap was no more than 0.5% of all those who received compensation from the PPF, and might be a little smaller.

The cost of removing the cap (paragraph 79)

218. The PPF's evidence was that the cost of removing the cap for the future for those who were already in the PPF would be about £200m, which was just under 1% of the PPF's liabilities. Mr de la Mare told us in his oral submissions that that is an overestimate, because that figure does not take account of the effect of the judgment of the Court of Justice in *Hampshire*. Further amounts would need to be paid as respects arrears. On the assumption that there was no limitation period, that would amount to about £40m. The costs of the schemes which transferred to the PPF in the future would increase. The PPF estimated that that would amount to about 1% of the PPF's liabilities. The removal of the cap would not, however, have, in the judge's words, "any immediate and directly discernible impact" on the amount of the levy on eligible schemes. We observe that the PPF's then conservative assumption that there might be no limitation period was falsified by the judgment. The judge held that the relevant limitation period was six years. There has been no appeal against that conclusion.

The effects of the cap on members and survivors (paragraphs 28-45)

Members

219. In this part of the judgment, the judge fully considered the effects of the cap on various claimants. He noted that, with two exceptions, the claimants were members of four pension schemes the sponsoring employer of which had become insolvent. The two exceptions were surviving spouses of former members. As we have already indicated, in paragraph 14, above, the judge gave worked examples of the effects of the cap.

220. He considered in detail the positions of two claimants, Mr Hampshire and Mr Hughes. He considered, in their cases, tables which compared, between 2007 and 2018, the scheme pensions they would have been paid had their employers not become insolvent, and what they received from the PPF (paragraphs 32, 33 and 39) (which he described as "pension"). Those tables show significant differences in every year. Mr Hughes

received sums ranging from about a quarter to less than a fifth of the pension he would have received in those years, and Mr Hampshire, between roughly a third and a quarter. These figures do not take account of the future impact of the Decision.

221. The judge considered the position of two pilots, Captains Parsons and Bruce, in paragraphs 41-43 and 44-45 respectively. They were members of the BMI and Monarch Schemes, respectively. They reached NPA in 2014 and 2015 respectively, after their employers became insolvent. As the judge recorded, pilots earn relatively high salaries. The former would have been entitled, at NPA, to a pension of £79,069 from the BMI Scheme. He received, or would have received, £24,881 from the PPF, or about a third. The latter would have been entitled, at NPA, to a pension from the Monarch Scheme of about £53,765. The amount he received from the PPF was £24,947, or less than half of that amount. These figures only relate to the position at NPA, and so do not take account, either, of the effects of the 2017 amendment (which was prospective only, from 6 April 2017 onwards, and did not, because of the relative shortness of his service, apply to captain Bruce), or of the future impact of the Decision.

The PPF's response to the decision of the Court of Justice (paragraphs 49-61)

222. The only part of this section of the judgment which is relevant to the discrimination claim is paragraph 52, which records that one aspect of the Decision was that the PPF would pay arrears of compensation, but that the period for which such compensation would be paid might be affected by the Limitation Act 1980. As we know, the judge decided that the relevant limitation period is six years.

The judge's reasoning on the discrimination claim

223. The judge considered the discrimination claim in paragraphs 118-138 under the heading 'Can the Secretary of State demonstrate that the provisions pursue a legitimate aim and are *appropriate and necessary* to achieve that aim?' (our emphasis). He recorded Mr Coppel's submission that the scheme had six aims, five of which were linked. The main justification for the 90% limit and the cap had two aims. The first was to encourage people to make responsible decisions about funding schemes. That aim would be supported if decision-makers know that they, their colleagues, and employees generally, will suffer significant losses if they make poor decisions. The second was to ensure that the costs of the PPF did not deter employers from continuing to provide pensions schemes. Three of the other stated aims explain the decision that all those below NPA on assessment date should receive less than full compensation, whether or not they had actually retired. The sixth aim was to encourage people to work for longer, and so to contribute to the economy and reduce burdens on the state.

224. The judge recorded the submissions, which he accepted (see paragraph 123 of the judgment), that decision-makers had a wide margin of discretion both in deciding whether a particular aim is legitimate and whether the means chosen to achieve it are "suitable and necessary", and that the decision was to be given particularly strong respect when it had been specifically considered by Parliament, where the effects of the decision were known, and where alternatives were considered.

225. He noted that the Secretary of State accepted that the burden on the Secretary of State of justifying a measure increased in proportion to the harshness its effects, but also submitted that the scheme which had to be justified was the scheme as it stood in 2020.

The proportion of those affected was relatively small. The cost of providing compensation without the cap for those presently in the PPF (£200m) was significant. Those affected had lost significant amounts of their pensions but they were still relatively well off. The effect had been mitigated by the *Hampshire* decision and by the introduction of the long-service cap. The differential treatment which had to be considered was that which arose from the statutory scheme as modified in those two ways. Seen in that light, the cap pursued legitimate aims and that measure was "suitable and appropriate" to achieve them.

226. The judge also recorded (correctly, to judge from his skeleton argument below) that the focus of Mr Coppel's submissions was the case law under the ECHR, rather than EU law. He contended that, while the language used by the Court of Justice was different from that of the European Court of Human Rights, the tests were essentially similar, and the result would be the same applying either test. The judge accurately recorded the submission that Article 51(3) of the Charter meant that if it granted rights which corresponded to rights guaranteed by the ECHR, the meaning and scope of the former were to be the same as the latter. The Court should not look at people who were at the margin, but only at the groups of people above and below NPA as a whole. Age was not a suspect characteristic which called for particularly weighty justification. The judge accepted those two final submissions (judgment, paragraphs 124).

227. In paragraph 122 the judge said that the relevant test was well established; it was whether the decision-maker was pursuing a legitimate aim and whether the measure in question was "appropriate and necessary" for achieving that aim. In assessing that, the gravity of the effects on those who are subject to the differential treatment are weighed against the importance of the legitimate aim. The more serious the effects of the measure, the more cogent is the justification which is needed. Legislatures and governments have a broad margin of discretion in deciding on aims and in choosing what means are "appropriate and necessary" for their achievement, especially where the issue has been specifically considered, together with alternatives.

228. The judge accepted, in paragraph 125, that the aim of combatting "moral hazard", that is, "in the wider sense of seeking to ensure that decision-makers act responsibly to ensure a pension scheme is properly funded" was identified at the time and is a legitimate aim, and that cost considerations "in the sense of ensuring that the funding necessary by way of levies on schemes does not deter employers from continuing to provide occupational pensions" were legitimate, and were identified at the time. He rejected the claimants' submissions that those were ex post facto rationalisations and that the absence of evidence about the effects of the operation of the cap was relevant to the issues he had to decide.

229. In paragraph 126, he would have accepted, further, that if the cap or other measures to achieve those aims were "appropriate", it would be "appropriate and necessary" to apply those measures to all those below NPA on assessment date, whether or not they had retired, and not to those who have reached NPA on assessment date. He doubted whether the aim of ensuring a fairer distribution of assets than occurred before 2005 would be sufficient to justify a system which, was unlawfully discriminatory. "In truth, that aim, viewed alone, or together with other aims, does not assist in resolving the issues in this case".

230. He accepted that it was open to Parliament to decide that the 90% limit for those below NPA on assessment day was an "appropriate and necessary" means of achieving the legitimate aims of addressing "moral hazard" and employers' concerns about costs. Parliament is entitled to take the view that "such measures will encourage decision-makers to act prudently and responsibly and avoid undue risks in managing pension schemes not only to protect their own pensions (if they are members of the scheme) but also colleagues and employees affected. The impact on those affected, although significant, does not render the measure *inappropriate or unnecessary*" (our emphasis).

231. In his view, the more difficult question was whether the cap, either in its original form, or as modified in 2017, was an "appropriate and necessary" means of achieving those aims. He took into account that Parliament had decided to impose the cap, and that it had considered the need to provide less than full compensation. He acknowledged that "It is rare that a court would find a conscious decision of that nature, in an area of economic and social policy, was not *appropriate*". He was "driven to the conclusion" that the cap, "as enacted and as modified in 2017, was not, in the circumstances of this case, an *appropriate* means of achieving the aims" (our emphases). He gave several reasons for that conclusion.

232. The first was the context: the adoption of measures to protect the accrued pension benefits of those whose employers became insolvent. In general, those were funded and accrued over time from the contributions of employees and employers, as part of an overall pay package. The protection consisted of compensation which is funded by the assets of schemes which are transferred to the PPF and levies on schemes generally (and not from general taxation).

233. Second, the cap applies only to a small proportion of those whose schemes transferred to the PPF (in fact, about 0.5%, although it had been thought that it might be up to 2%). The impact on that small number of people was "significant. It can produce very serious financial losses" for them. The facts illustrated "the kinds of very substantial reductions in their accrued pension benefits that a small number of employees" would suffer. A cogent justification was needed for measures having that effect.

234. Third, those taking decisions about a scheme know that all members below NPA will suffer losses if they manage the scheme imprudently, as they will all only get 90% of their pension entitlement. "It is not easy to see how the imposition of a further, very significant, cut in accrued pension benefits for a very small group of employees would realistically or reasonably add weight to the aim of combatting moral hazard in the form relied upon. Similarly, it is hard to see that the imposition of the compensation cap on a small number of pensioners, and reducing very significantly the degree of protection of accrued benefits of that small group, would realistically be *appropriate or necessary* to reassure employers that the cost of the [PPF] would not be such as to deter them from providing occupational pensions" (our emphasis).

235. A fourth, significant factor was the requirements of the Directive. Its aim was to protect employees and former employees in insolvency. A member state had "considerable latitude" in deciding how to provide protection. There was no obligation to provide full protection. Member states did, however, have to "guarantee to each individual employee, without exception, compensation corresponding to at least 50% of their accrued entitlement". The judge recorded Mr Coppel's submission that that directly

effective obligation mitigated the effect of the cap, and that it was the domestic statutory scheme, as so mitigated, and as modified in 2017, which had to be justified.

236. The judge did not accept that submission. A better way of understanding the position was that, as enacted in 2004, and as later modified, the cap did not satisfy the aims of the Directive which the legislation was, in part, meant to implement. The provisions as enacted failed to provide protection for pension rights in the event of the employer's insolvency. They would have to be modified to that extent, in any event. That reinforced the conclusion that the cap "was not an *appropriate* means of achieving the legitimate aim of protecting accrued pension entitlements". The fact that the harsh effect of the cap will be mitigated by directly effective provisions of EU law "does not make the compensation cap (even as now applied) *appropriate* to achieve the relevant aims" (judgment, paragraph 132, our emphases).

237. A further point was that by 2017 "(and perhaps earlier)" it was realised that it was not "appropriate" to apply the cap to long-serving employees (for whatever reason). Paragraph 26A was inserted in Schedule 7 with prospective effect from 6 April 2017 only. There was no mitigation for members whose benefits were adversely affected before that date. The mitigation post 6 April 2017 either does not affect the assessment of the position before that date, or "indicates, if anything", that the application of the cap to the sub-set of long-serving employees in relation to their benefits before 6 April 2017 "had results which were either unintended or which would not now be considered acceptable. That would, if anything, support the conclusion that the statutory provisions imposing the cap prior to 2017 were not an *appropriate* means of achieving the relevant aims in that period" (judgment, paragraph 133, our emphasis).

238. In paragraph 134 of the judgment he described a further point. The limited changes in 2017 did not "serve sufficiently to diminish the adverse effects of the …cap for long-serving employees so as to make the statutory provisions an *appropriate* means of achieving the legitimate aims". Despite the minimum guarantee required by Article 8 of the Directive, and the increase for long-serving employees in 2017, the factors he had already referred to "still lead to the conclusion that the statutory provisions imposing the …cap are not an *appropriate* means of achieving the legitimate aims" (our emphases).

239. The judge considered the sixth aim of the cap in paragraph 135 of the judgment. That aim was encouraging people to work longer, and thus contributing to the economy and reducing burdens on the state. He had "real doubts" whether the cap was "rationally connected with this aim". It only applied to a small percentage of pensioners with big pensions (whether because of high salaries, long service, or both); probably up to 0.5% of present and anticipated pensioners whose schemes were or would be administered by the PPF. It was not "immediately clear" why applying the cap to a small group of employees with high accrued pension benefits because they had not reached NPA when the employer became insolvent "is rationally connected to an aim" of making people work for longer. In any event, given the factors the judge had already referred to, it would "not be appropriate" to impose the cap and require that small group of workers to suffer "the severe financial effects of the cap" (even with the directly effective 50% mitigation and the 2017 amendments).

240. In paragraph 136, the judge repeated Mr Coppel's submission that the focus should be the statutory provisions in their current form. The judge's response was that, as he had

indicated during the oral argument, the claim "involves consideration of the position of arrears". It was accepted that those were recoverable from at least 2012 onwards. It was therefore necessary to address the lawfulness of the cap over a longer period "than simply the present day". In paragraph 137, he expressed his conclusion that the cap amounted to unlawful discrimination on the grounds of age "from 2005 when it was first imposed".

241. In the light of his conclusions on the question of age discrimination, the judge did not find it necessary to consider the arguments about proportionality in EU law (judgment, paragraph 138).

The submissions

242. The parties agreed about the test which applies when an appellant challenges an assessment such as this by a judge at first instance. It has been considered recently by the Court of Appeal on several occasions. In *Delve* this Court said that it does not, on an appeal, "second guess the first instance judge. It does not carry out the balancing task afresh, as though it were rehearing the case but must adopt the traditional function of review, asking whether the decision of the judge below was wrong: see *R (RR) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; [2018] 1 WLR 4079, paragraph 64". See also *R (TP) v Secretary of State for Work and* Pensions [2020] EWCA (Civ) 37; [2020] PTSR 1785 at paragraphs 119-123.

243. Mr Coppel introduced his oral argument by submitting that the judge had correctly recognised that it was only in a rare case concerned with a judgment about social and economic policy that a court would find that primary legislation is unlawful. He submitted, nonetheless, that the judge had failed to identify the correct legal target, to apply the correct test, or to allow an appropriate margin of discretion. The judge had been unduly influenced by one factor, the losses suffered by the claimants. That factor, he submitted, 'EU law tells us', is not a significant factor in the analysis (see paragraphs 250 and 251, below, where we describe this argument more fully).

244. The Claimants and the judge accepted that the 90% limit was lawful, and thus, that it was lawful, in principle, to distinguish between those above and below NPA. The judge should have applied the same reasoning to the cap.

245. Mr Coppel referred to the policy documents which the judge summarised in the judgment (see paragraphs 202-210, above). He accepted that the judge had done "a thorough job". It was important to see the extent of the consideration which officials had given to the issues at the relevant time, that is, before enactment. The judge could not see how the cap was necessary if there was a 90% limit, but he had been shown many documents which said that both were needed. The documents showed that dealing with "moral hazard" was essential to the success of the legislative scheme. The judge did not explain why he disagreed with the approach in the documents. The "moral hazard" was addressed not just by the effect of the cap on the salaries of those who took companies to the wall, but by the effect on the salaries of their colleagues, whom they cared about. It was very important that these issues had been specifically considered, and in detail, before enactment, that Parliament had approved the measures, and that age was not, in any event, a suspect ground of discrimination.

246. He submitted that in order for a means to have a rational connection with an aim, it was sufficient if a measure contributed materially, that is, in a way which is more than de minimis, to a legitimate aim (see paragraph 68 of *Gubeladze v Secretary of State for Work and Pensions* [2019] UKSC 31; [2019] AC 885).

247. Mr Coppel accepted that this Court could only interfere with the judge's decision if it was "wrong". His submission was that the judge applied the wrong test by asking whether the cap was "appropriate", in several places in the judgment, although he accepted that the judge had stated the test correctly in paragraph 122 of the judgment.

248. The judge had accurately identified the two main aims of the cap in paragraph 127, and that the 90% limit was an appropriate and necessary means of achieving those aims. The judge had given four, or possibly five, reasons why the means were not appropriate and necessary. At least four of those were not relevant to appropriateness, properly understood.

249. Even if it was assumed that the judge was considering whether the cap had a rational connection with the legitimate aim, and/or was appropriate and necessary, there were three reasons why the judge had reached the wrong conclusion. First, he had not explained why he disagreed with the conclusion of the document he referred to in paragraph 65 of the judgment, which said that the cap would have a valuable additional effect. He did not refer to it in paragraph 130. Second, it was illogical, having found that the 90% limitation was appropriate and necessary to the achievement of a legitimate aim, not to find the same about the cap. If one was appropriate, so was the other. There might be a necessity point about the cap, he accepted. Third, there was no evidence that the judge had in practice applied the appropriate margin of discretion.

250. Mr Coppel then examined the reasons the judge gave for his conclusion. He submitted that it was not clear where those reasons fitted into the analysis. Paragraph 129 did not support the judge's analysis. The fact that contributions were made was not really relevant, since the PPF administers contributory and non-contributory schemes. The universal feature was that pensions could no longer be paid because of the employer's insolvency. Any accrued entitlements had been lost. That was nothing to do with the Government and nothing to do with the PPF. The claimants, instead, have a claim to compensation. As he put it in his reply, the accrued entitlements were, of course, deferred pay. But the institution which was liable to pay was insolvent, and there was no enforceable right to payment, only a right to compensation from the state. The link with the accrued entitlements was broken.

251. The judge was most influenced by the effect of the cap on individual claimants, and the small number affected. The smallness of the number was a factor in favour of the cap. A wider impact would be more difficult to justify. The costs saved by the cap are significant. The evidence did not show severe hardship, but, rather, that the expectations of well-off professionals were being frustrated. He did not minimise that, he said. The impact was a key point on necessity. The evidence on which the judge relied did not take account of the directly effective 50% minimum compensation. It was not clear why the judge did not take into account the 50% minimum. The evidence he relied on was an incomplete way of understanding the current scheme. The reductions caused by the cap did not breach EU principles of proportionality in this field, because they did not take any of claimants below Eurostat's 'at-risk-of-poverty threshold' for the relevant member state (see *Pensions-Sicherungs-Verein VVaG v Bauer* (C-168/18) [2020] ICR

985). The judge should have explained how, if the outcome was not disproportionate for the purposes of Article 8, it could somehow disproportionate under some other limb of European law.

252. The judge had not weighed the impact against the importance of the legitimate aim, although, in paragraph 122, he said that he would do that. Paragraph 122, it seemed, was the right place in his analysis for that. That balance was, classically, influenced by the margin of discretion, all the more so when the issues had been thought about when the policy was made. The documents had considered alternatives, but the judge did not grapple with whether any was better than the cap. The judge had given too much weight to the impact of the cap.

253. The fact that the cap did not respect the 50% minimum obligation was not an appropriateness point (paragraph 131 of the judgment). This reasoning was misdirected, as what had to be justified was the current legislative scheme, as modified by the directly effective obligation. The relevant difference of treatment was between 90% and 50%. The judge had failed to consider that relevant difference in treatment between the claimants and those who were above NPA at the date of assessment. The difference was not between 25% and 90%. It was wrong to focus on the position on enactment, although Mr Coppel accepted that the past was not irrelevant. The directly effective obligation supported the justification argument. The mitigations did not undermine the "moral hazard" or cost arguments and made the cap less serious than when it was enacted. He accepted that some of the judge's language was ambiguous, but his position was that the language tended to show that the judge was making the wrong comparison. If this was not an identifiable flaw in the application of the proportionality test, it was hard to see what would be.

254. Mr de la Mare submitted that the *Hampshire* case showed that the cap was logically incapable of justification as it was the main, if not the sole, cause, of the failure of the legislative scheme to provide the minimum protection required by EU law. It was not clear how the arguments used to justify the cap as originally enacted applied to the scheme as modified by EU law. The signal sent by the current scheme was very different, which changed the moral hazard argument. He referred to the decision of the CJEU in *Chez Razpredelenie Bulgaria AD v Komisia Za Zashtita Ot Diskriminatsia* (GC) (Case C-83/14)[2016] 1 CMLR 14, which concerned the practice of an electricity supply company of putting electricity meters on pylons 6-7 m above the ground in areas where Roma lived (a case, therefore, about indirect discrimination). In paragraph 128, the Court of Justice answered the tenth referred question by saying that such a practice could be objectively justified if it "did not go beyond what is appropriate and necessary to achieve those legitimate aims and the disadvantages caused were not disproportionate to the objectives…".

255. The presence of Article 12 in the Directive, and the sceptical views about "moral hazard" which Advocate General Kokott expressed in her Opinion in the *Hampshire* case left little, if no, scope for "moral hazard" as a justification for the cap. A generalised suspicion of abuse was not sufficient. Many of those affected, such as pilots, were not decision-makers, and were not close to decision-makers. It was irrelevant that some schemes in the PPF were non-contributory because employers paid both contributions, and the levy, and pensions are deferred pay. It was not appropriate, or fair, to read the judgment as if it were a tax statute.

256. The question was a question of substance. The judge looked at all the factors and held that, even with a wide margin of discretion, the cap was not justified. The purpose of the 90% limit was distinct from the purpose of the cap. The 90% limit was not the cause of the problem identified by the Court of Justice in *Hampshire*. It applies to everyone, and everyone below NPA can, in theory, go back to work. The cap is a targeted deterrent for high earners. The essential logic of that disincentive is blunted, if not lost, once a 50% minimum has to be paid. The fact that the scheme is now, perforce, less unfair, and less unlawful, is not relevant to justification.

257. Both counsel agreed that there was little, if any, relevant distinction (other than the remedy which might be available) between the EU and the ECHR arguments, and that the conclusion about the second would be likely to follow the conclusion about the first.

Discrimination: discussion

258. Mr Coppel had four main criticisms of the judgment.

i) The judge applied the wrong test.

ii) The judge did not, in substance, give the Secretary of State the wide margin of discretion to which the Secretary of State was entitled.

iii) The judge was wrong not to focus on the justification for the current scheme.

iv) The judge's distinction between the cap and the 90% limit was irrational.

We will consider the first three criticisms in paragraphs 263-267 below. We consider the fourth criticism in paragraphs 261-262, below. Our starting point is that we are not making the decision for ourselves, but reviewing the judge's conclusion to see if it was justified: see paragraph 6 of *Friends of Antique Cultural Treasures Limited v Secretary of State for Department of Environment, Food and Rural Affairs* [2020] EWCA Civ 649; [2020] 1 WLR 3876:

> " … in a proportionality challenge it is well established that the court will objectively assess the evidence for itself to determine whether the disputed measure is proportionate. This assessment is based upon the most up to date evidence. This was the position taken by the Judge. Following such an assessment the role of an appellate court is determined by the national procedural rules applicable: *Scotch Whisky Association v Lord Advocate* (Case C-333/14) [2016] 1 WLR 2283 paras 63-65. In this jurisdiction, following a proportionality assessment, an appellate court does not re-perform that assessment but considers whether the reasoning of the judge below was justified: *R (AR) v Chief Constable of Greater Manchester Police* and another [2018] 1 WLR 4079, para 64. An exception can arise where there is relevant *new* evidence admitted before the appellate court… This does not, however, arise on this appeal and the task of this court is therefore to decide only whether the Judge's analysis withstands scrutiny."

259. Before we examine those four criticisms, we will consider the structure of the judge's reasoning, as, in our judgment, it explains his approach. The Act implements the Directive. The starting point, therefore, for any analysis of justification is the Directive, as interpreted by the CJEU. Article 8 of the Directive is directly effective. It applies when an employer becomes insolvent. It requires member states to "ensure that the necessary measures are taken to protect the interests of employees" and of former employees "in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits".

260. The protection conferred by Article 8, rightly, was also the judge's starting point (see the first sentence of paragraph 129 of the judgment). The protection required by Article 8 is the framework for any argument about justification. Paragraph 129 rightly describes the domestic position, which is that entitlements to pension benefits are generally funded and built up over time by contributions from employers and employees. Those entitlements represent deferred pay. The sources of the PPF's funding, which pay for the protection, are also relevant. In essence, the employees concerned, whatever their level of pay, have earned their pension entitlements, and it is their interests in those entitlements which Article 8 requires member states to protect.

261. The requirements of the Directive, as the judge recognised in paragraph 131 of the judgment, rightly, are a "significant consideration". The Court of Justice has held that the word "protect" in Article 8 must be interpreted as requiring member state to "guarantee each individual employee, without exception, compensation corresponding to least half of value of their accrued entitlement" (paragraph 50 of *Hampshire*) (quoted in paragraph 131 of the judgment). As we will explain, the judge's reasoning exposes a contradiction between the aim of providing the protection which Article 8 requires, and achieving the legitimate aims which, he recognised, the cap sought to achieve. It seems to us that the judge was not wrong to resolve that tension in favour of the requirements of Article 8, to which the cap's aims, no matter how legitimate they may be, are self-evidently subordinate.

262. It follows that the judge was also not wrong to differentiate, in principle, between the 90% limit and the cap. This distinction is not illogical, because the 90% cap is both appropriate and necessary to achieve the legitimate aims (as he explicitly found in paragraph 127), and it is consistent with the aim of protection which is imposed by Article 8; whereas the cap is not consistent with that aim. That means that it does not matter whether the further reasons for that distinction which he gave in paragraph 131 of the judgment are wrong, or not. In any event, we consider that those reasons are not wrong. The short point is that the cap produces, for a small number of employees further very significant reductions in protection (see the judge's reasoning in paragraph 129). They do not obviously or materially ("realistically or reasonably") further either of the legitimate aims. In other words, quite apart from being inconsistent with Article 8, they do not strike the balance between aims and the means to which he referred in paragraph 122.

263. As the judge recognised in paragraph 129 of the judgment, the cap applies to a tiny proportion of employees whose schemes transfer to the PPF. The cap could cause them "very serious financial losses". A cogent justification was needed for that. The judge was not wrong to say so. Some of claimants have, over significant periods, incurred "very substantial reductions in their accrued pension benefits". They had earned those accrued benefits. Mr Coppel's argument that the employer's insolvency breaks the link

between accrued entitlements and the protection to which an employee is entitled is not to the point. Article 8, as interpreted by the Court of Justice, supplies that link. The domestic legislation is required to reflect that link; as indeed it does, fully in the case of employees who have reached NPA, and to the extent of 90% in the case of most of those who have not.

264. The judge considered Mr Coppel's submission that it is the current scheme which must be justified. He rejected that submission in paragraphs 132 and 136. He was not wrong to do so. His approach in paragraphs 132-134 was that the cap, as originally enacted, simply failed to provide the protection which Article 8 requires, and which was the very purpose for which the provisions were enacted. That reinforced the view that the cap was "not an appropriate means of" achieving the aim of protecting pension entitlements. The 2017 amendments supported the view that the cap was not appropriately applied to long-serving employees. That mitigation, however, was limited, and did nothing to offset losses before 2017. It reinforced the view that the cap was not an appropriate means of achieving the relevant aims in that period. Its very limitations meant that it did not "sufficiently diminish" the adverse effects of the cap so as to make the statutory provisions an appropriate means of achieving the legitimate aims. The minimum guarantee and the 2017 mitigations "still lead to the conclusion that the statutory provisions… are not an appropriate means of achieving the legitimate aims".

265. His approach in paragraph 136 was that the claim also involved consideration of the arrears which might be due. It was accepted that they were recoverable from at least 2012 onwards. It was therefore necessary to address the lawfulness of the cap over a longer period than simply the present day.

266. We consider that the judge was not wrong to hold that he was required to consider the justification for the cap from the date of enactment onwards, and was not compelled simply to look at the recent mitigations provided by the Court of Justice and the 2017 amendments. There are at least two obvious reasons why. First, the cap was enacted in 2004. The first question, logically, is whether it was justified when it was enacted, in the form in which it was enacted. The clear answer to that is 'No' (because of the *Hampshire* decision and the 2017 amendments). Second, while the cap has present and continuing effects, to which the mitigations are relevant, it has also had past effects. The force of those past effects depends on a number of factors, one of which is whether, to the extent that the cap is not now sought to be justified (in respect of long-serving employees) or is straightforwardly unlawful (because it fails to respect the 50% minimum) any affected employee can recover the compensation he should have been paid, but was not paid. The short answer is that because of limitation, there are very significant past losses, as respects the 50% minimum, which some affected employees will never recover. Further, the affected long-serving employees may recover nothing at all in respect of the injustice which was recognised and remedied by the 2017 changes, because although the changes are a tacit acceptance that this effect of the cap was not justified, those changes are prospective only.

267. We now consider whether the judge applied the wrong test. Mr Coppel accepts that the judge stated the test correctly in paragraph 122. In the course of our summary of the judge's reasons in paragraphs 222-240, above, we have either italicised the words which might indicate the test he applied, or put them in inverted commas. It is true that he sometimes uses the phrase "appropriate and necessary" and that, sometimes he uses the word "appropriate"" It does not follow that he misdirected himself, and we do not

consider that he did. First, if something is not an appropriate means of achieving a legitimate aim, it does not matter whether or not it is necessary to achieve the aim. Second, where the judge used the word "appropriate" on its own, we consider that he was using it to indicate that he was considering a point about the appropriateness of the measure, and not about its necessity. In any event, Mr Coppel appeared to accept that the distinction did not matter all that much in this case, as his main criticism of the judge's use of the word "appropriate", when he used that word, was that the judge was really considering points, which, Mr Coppel submitted, were necessity points.

268. There are two answers to Mr Coppel's submission on the margin of discretion. The first, formal answer, is that the judge clearly said that he recognised, in principle, that this was a case in which the state had a wide margin of discretion, for all the reasons which Mr Coppel advanced, and which the judge accepted in his judgment. The second answer is that, in substance, this was a case in which, for the reasons which the judge gave, the margin of discretion did not help the state to show that the discrimination was justified. The Secretary of State's arguments on justification were based on the policy considerations and documents which were produced before enactment. Those documents developed and justified a significantly different policy from the policy position which the Secretary of State was trying to justify before the judge, since the cap, as enacted, had been modified in two very significant ways after its enactment. There was no evidence that officials had consciously adverted to the justification for the modified policy position. There was therefore nothing, apart from forensic argument, to justify it. Moreover, the initial policy as enacted had (a), in effect, been acknowledged not to be justified in the case of longer-serving employees, and (b) had been held to be unlawful by the Court of Justice.

Conclusion on age discrimination

269. This ground raised an important issue, because the judge's conclusion was that the statutory cap is inconsistent with EU law and must be disapplied. We have had to consider his reasoning with some care. We grant permission to appeal on this ground. For the reasons given above, however, we consider that the judge was not wrong to decide that the cap amounted to discrimination on the grounds of age which was not justified. We dismiss this ground of appeal.

Summary of Conclusions

270. In summary, therefore, we allow the PPF Appeal on both grounds. We refuse the Secretary of State permission to appeal on Grounds 1 and 2. We give permission to appeal on ground 3, but dismiss the appeal.